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In the Supreme Court of the United States.

No. 167.

JOHN BÉNÉ AND ADOLPH GRÜNSBERG,
Appellants,

vs.

EMILE JEANTET.

BRIEF FOR RESPONDENT.

WILLIAM P. S. MELVIN,
Of Counsel for Respondent.

Evening Post Job Print, New York.

In the Supreme Court of the United States.

JOHN BÉNÉ AND ANO.,
Appellants,

vs.

EMILE JEANTET.

No. 167.

This cause was commenced for an alleged infringment of a patent on a process for refining and bleaching hair. The bill of complaint having been filed, and exceptions having been taken to the bill on account of scandalous and impertinent matter contained therein, and the defendant failing to bring the exceptions to a hearing, the bill was taken by default *pro confesso;* but this default was opened on condition, however, that the question of the validity of the patent should not be put in issue.

The answer of defendant denies an infringement of the patent, and the testimony upon the issue thus presented appears at large in the transcript of the record.

The facts of the case are as follows:

The complainant John Béné procured a patent March 25, 1879, it being Reissue Letters Patent No. 8637 (*q. v.*, pp. 48, 49 and 53, Transcript of Record).

This patent is for an improvement in the treatment of hair by chemical action so that the diameter of the hair is reduced, the surface of the hair being corroded or dissolved away.

It appears from the testimony of Jean R. Krause, a ladies' hairdresser and wigmaker (p. 13, *et seq.*), that he bought from the defendant, who is a hair merchant in the City of New York, on January 16, 1882, one pound and one and one-half ounces of what is known as refined Chinese hair (Exhibit 3, Krause), which hair complainants contend was refined by the process described in the patent.

This hair was obtained by the defendant in Paris, France. On the evening of the day of purchase the witness Krause turned the hair over to the complainant Béné, who thereafter commenced this suit for infringement.

No direct proof was offered by the complainants that this hair was treated or refined by the process very vaguely described in the specifications of the patent, and the whole endeavor on their part is to have the Court infer that it must have been so treated. For this purpose they presented the testimony of an alleged expert, Nathaniel S. Keith, and to repel such inference the defendant called an expert, Charles Marchand, who testified that hair could be refined by other processes than that specified, and produced hair treated by him in manners different from the specified process.

It is important to observe that though the complainant Béné claims as part of his invention the bleaching of hair, this claim is withdrawn so far as bleaching is not incidental to the refining (fol. 125, p. 78).

The hair treated by Marchand's processes is identified here as Defendant's *Exhibit* No. 1, *Exhibit No.* 2, *Exhibit No.* 3, one strand of *Exhibit No.* 4, and *Exhibit No.* 6.

Exhibit No. 1 is substantially a treatment by chlorine gas solution in pure water and a solution of peroxide of hydrogen and ammonia (p. 82).

Exhibit No. 2 is substantially a treatment by a concentrated solution of permanganate of potash in water with

sulphuric and muriatic acid, and finally by peroxide of hydrogen and ammonia (p. 82).

Exhibit No. 3 is substantially a treatment in a solution of sulphurous acid in water alternately with a strong solution of permanganate of potash, and finally treated with peroxide of hydrogen (p. 82).

The strand of hair treated by Marchand in Exhibit No. 4 was treated by one of the foregoing three methods (fol. 134, p. 84).

Exhibit No. 6 was treated by the concentrated solution of peroxide of hydrogen in the ordinary way (p. 104).

Point I.

While there is no contention about the validity of the patent, the claim under it (No. 1) of refining hair by subjecting it *to the action of chemicals*, &c., is too indefinite, and is void for uncertainty.

Point II.

The question of infringement resolves itself substantially into one of veracity between the two witnesses (Marchand and Keith), and the burden of proof is on the complainants to show an infringement.

Brooks *v.* Jenkins, 3 McLean, 453.
Railway Co. *v.* Sales, 97 U. S., 554.

Point III.

In deciding between contradictory expert testimony, the respective reasons, ability, knowledge and fairness of the experts is to be considered.

Waterbury Brass Co. *v.* N. Y. Brass Co., 3 Fisher, 43.
Conover *v.* Rapp, 4 *id.*, 57.
Whipple *v.* Mfg. Co., 4 *id.*, 29.

The witness Keith is a professional expert (pp. 33, 38). He never attended any lectures on the subject of chemistry, but pursued his studies in the chemical laboratory of his father who practiced medicine and manufactured pharmaceutical preparations (pp. 36, 37). He states that he has given hair special consideration only during the three or four years preceding his examination herein; and it is fair to suppose that this consideration was only in connection with this suit and one other regarding this patent (Béné *v.* Grünsberg), because he testifies that his experiments with hair were with reference only to these two suits (pp. 38, 41).

The witness, after an examination of Marchand's exhibits, impliedly admits that they have all been refined. Defendant's Exhibit Marchand No. 1 is, he *thinks*, not as fine as the average of refined hair (p. 57). Exhibit No. 2 (6 bunches) are very slightly changed; are not refined hair within the meaning of the patent. As to Exhibit No. 3, he admits that they seem to have been submitted to chemical action which has somewhat affected the surface of the hair (p. 57); and he candidly says that the three bunches in Exhibit No. 4, of which one bunch was Marchand's, are refined hair (p. 63).

As to some of these exhibits Keith lays some stress on the fact that the hair breaks more easily than natural hair, or is rotten, but it will be seen by his own testimony that the strength of hair is mainly in the materials composing or lying near its external surface, and that the sub-

jection of hair to Béné's or any other's bath *essentially weakens it;* that the bath according to Béné's formula is strong enough to dissolve or corrode the hair (pp. 39, 74); that the action of the bath may be said to be both a solvent and a *disintegrating* one (p. 35), and that he means by the term "rotten" as applied to hair, hair that is more or less *disintegrated* throughout its substance (p. 72).

This witness is not fair. It will be noticed that the witness, Marchand, repeatedly describes hair that has been *refined*, as hair that has been submitted to an *oxidizing* agent. Keith, for the purpose of belittleing the testimony of his opponent, boldly declares that he (Keith) had not undertaken to consider the oxidation of the hair, *but only* its refining, adding that "*evidently oxidation was another name for ruination*" (p. 73), but being pressed in cross-examination (q. v., pp. 74, 75) he admits that he has not noted specially the action of oxygen upon hair; cannot state whether the hair is made soluble by oxidation or *chlorination*, or both, and that the materials of the hair are not removed by oxidation, and all this in face of his previous testimony whith he had evidently forgotten (p. 35) that in this bath "some of the carbonaceous matter of the hair is also oxidized."

Again, when testifying as to the faithful observance by him of the formulas of Marchand in experimenting under them, he was asked if he reduced the strength of a certain solution as required, he answered that he did (p. 70), but further on admits that he *did not* (p. 71) and seeks to justify himself for the falsehood. Some endeavor was made by this witness to criticise Marchand for his saying that chlorides and chlorates of potash are not dissolved in muriatic acid, but rather are *decomposed*, but we submit that in view of his testimony (pp. 85, 95) and that of Keith (pp. 34, 54) Marchand is correct, and does not substantially differ in his statements from those of the authors whose works are quoted.

Throughout the whole of witness Keith's testimony the disposition of a partisan may be seen. He is inclined to prevaricate; he is not frank, but exhibits an inclination to

be profuse and volunteering when testifying for the complainants, and on the contrary to cloud and color his meaning when testifying on cross-examination.

Placed in contrast with his, the testimony of Marchand carries conviction. He is a chemist by education and in his business. He has been a student in chemistry for twenty four years (pp. 80, 84). His business includes the bleaching and refining of hair (p. 80). He produces several specimens of refined hair which have been refined by different agencies, and says that he has employed all these agencies in his business. He described in detail the processes by which these specimens have been treated in refining them, and if the so-called expert Keith has not succeeded as well in following out these processes it is because he is a tyro in the art, or because he was unwilling to be successful. Throughout his testimony the candor of Marchand shines forth. He is as ingenuous on the cross, as on the direct-examination, and the clearness of his utterances convinces even a layman of his knowledge of his profession and his sincerity. Ever endeavor to shake the force of his testimony failed and the criticisms of Keith are at most upon trivial matters, but on everything that is material and important to the issue Marchand's evidence is undisturbed.

Point IV.

The appeal should be dismissed.

WILLIAM P. S. MELVIN,
Of Counsel for Defendant.

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129-688

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 118.

THE SCHRAEDER MINING AND MANUFACTURING COMPANY, PLAINTIFF IN ERROR,

vs.

ELISHA A. PACKER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

FILED OCTOBER 13, 1885.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 1084.

THE SCHRAEDER MINING AND MANUFACTURING COMPANY, PLAINTIFF IN ERROR,

vs.

ELISHA A. PACKER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

INDEX.

	Original.	Print.
Caption	1	1
Appearance docket entries	1	1
Transcript from State court	9	4
Precipe for summons	9	4
Summons and return	10	4
Declaration	12	5
Appearance	15	6
Nolle prosequi as to J. E. and V. E. Piollet	16	7
Amendment of record	17	7
Additional plea	18	7
Amendment to Narr	19	7
Petition for removal	20	8
Rule for removal	23	9
Bond for removal	24	10
Objections to removal	27	11
Order for removal	28	12
Appearance for plaintiff	29	12
defendant	30	12
Petition to remand	31	13
Order discharging rule to remand	38	16
Defendant's exceptions to order discharging rule to remand	39	16
additional plea	40	17
Order *in re* plea of statute of limitations	41	17

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	Original.	Print.
Amendment to declaration	42	18
Plaintiff's points	43	18
Defendant's points	47	19
Minutes of trial	51	21
Judgment docket entry	52	21
Order as to sealing bill of exceptions	53	22
Order extending time to seal bill of exceptions	54	22
Bond on writ of error	55	23
Bill of exceptions	58	24
Plaintiff's case	58	24
Defendant's case	65	26
Plaintiff's case continued	68	27
Defendant's case continued	73	29
Charge to jury	84	33
Defendant's points and exceptions	99	39
Exhibit A—Diagram	108	42
B—Grant to Sam'l Wallis, February 24, 1795	109	42
C—Diagram	112	43
D "	113	43
E "	114	43
F "	115	43
G "	116	43
H "	117	43
I "	118	43
J—Grant to Dan'l Broadhead, June 27, 1794	119	43
K—Deed between Joseph Priestly *et ux.* and John Vaughan and Thos. Fitzsimmons and Jas. Miller, Jr., October 25, 1805	122	44
L—Diagram	134	48
M "	135	48
N "	136	48
O "	137	48
P "	138	48
Q—Deed between E. A. Packer and Jacob Dewit, Nov. 2, 1869	139	49
R—Articles of agreement between E. A. Packer and Jacob Dewit, November 2, 1869	147	51
Assignment of errors	149	52
Prayer for reversal	171	59
Writ of error	172	60
Clerk's certificate	174	60
Citation	175	61
Proof of serviceof citation	176	61

1 Among the rolls, records, and judicial proceedings had in the circuit court of the United States for the western district of Pennsylvania, wherein Elisha A. Packer is plaintiff and The Schrader Mining and Manufacturing Company is defendant, entered at No. 45, May term, 1884, may be found the following words and figures, to wit:

Appearance. Docket Entries.

ELISHA A. PACKER, a Citizen of the State of New York,

vs.

THE SCHRADER MINING AND MANUFACTURING COMPANY, a Corporation of the State of Pennsylvania, and located at Towanda, Bradford county, within the Western district of said State of Pennsylvania.

Record on removal of case from the common pleas court of Bradford county, Pennsylvania.

[On margin:] James Ryan, D. C. De Witt, W. T. Davies.

Summons issued February 26, 1877, whereof with force and arms, &c. Same day declaration filed; same day plaintiff refers, A. D., vol. 14, page 287. Summons and rule returned served on Victor E. Piollet and Joseph E. Piollett personally, and on the Schrader Mining and Manufacturing Co. by personally making known
2 to Victor E. Piollett, one of the directors, and Joseph Powell, treasurer of the said company, the contents of same, and giving to each a true copy on March 8, 1877. June 16, 1877. Plaintiffs discontinue as to Victor E. Piollett and Joseph E. Piollett. June 16, 1877. Award of arbitrators filed in favor of plaintiffs. Same day defendant appeals. July 28, 1877. Defendant pleads not guilty. February 23, 1879. Plaintiffs enter a rule to take depositions; served June 12, 1879. March 18, 1879. Plaintiffs enter a rule to take depositions. May 24, 1879. Plaintiffs enter a rule to take depositions. Nov'r 10, 1879. Case ordered at head of list for 3d week of December term, 1879. December 15, 1879. Case came on for trial; jury sworn. December 17, 1879. Record amended by striking therefrom all names except Elisha A. Packer, as plaintiff, on affidavit of D. C. De Witt. By leave of court defendant adds the plea of *liberum tenementum*. Defendant alleges surprise, and case continued till next term. December 18, 1879. Rule granted on plaintiff to give security for costs. January 26, 1880. Plaintiff files interrogatories. Feb'y 4, 1880. Cross-interrogatories filed. Feb'y 16, 1880. Commission and interrogatories issued to Charles Nettleton. Feb'y 10, 1880. Depositions received in a sealed envelope and filed; same day bond for costs approved and filed. Feb'y 12, 1880. Case called for trial;
3 jury sworn. Feb'y 16, 1880. Plaintiff asks to amend narr. by striking out "against the provisions of the act of assembly of 29th M'ch, A. D. 1824," and same allowed. Feb'y 17. Plaintiff's points filed. Same day. Plaintiff excepts to the charge of the court. Same day. Defendant excepts to charge of the court. Same day. Jury find for the defendant. Feb'y 19, 1880. Defendant's bill of costs filed. Same

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day. Sheriff's receipt for jury fee filed. Feb'y 20, 1880. Reasons for a new trial filed, and leave granted to make motion for rule. M'ch 29, 1880. Feb'y 21, 1880. Charge of the court filed. April 5, 1880. Rule for new trial refused; whereupon judgment in favor of defendant and against plaintiff for costs. April 16, 1880. Writ of error filed; served on Davies & Hall, atty's for def't. Ap'l 15, 1880, March 4, 1881. Certified to supreme court. May 16, 1881. Remitt-ur from supreme court filed, wherein the judgment of the court below is reversed. Sept. 19, 1881. Order to be put on the second week, Nov. T., next as the third case on trial list. May 11, 1882. Continued to adjourned term, 1882, 4th on list. And now, to wit, this August 31, 1882, case came on for trial; jury sworn. Sept. 5, 1882. The plaintiff excepts to the charge of the court. Same day. Defendant excepts to the charge of the court, both exceptions taken before verdict. Sept. 16, 1882. Jury find for the plaintiff in the sum of $8,900.00.

Sept. 7, 1882. Affidavit filed by leave of court, with motion
4 for new trial. Sept. 11, 1882. Rule granted to show cause why new trial shall not be granted. January 3, 1883. Charge of the court filed. Same day. Extract from the testimony taken by F. P. Tupper filed. Same day. Defendant's points filed. Same day. Two sets depositions filed. January 3, 1883. Opinion of the court filed, wherein verdict is set aside and new trial granted. March 27, 1883. Case called for trial; jury sworn. April 3, 1883. Pl'ff's points and answers thereto filed. Same day. Pl'ff files exceptions to charge of the court. Same day. Defendant files exceptions to charge of the court, both after charge and before verdict. April 4, 1883. Jury find a verdict for plaintiff, made up as follows, viz: 3,400,000 feet of hemlock, at $1.50 per M., $5,100; 100,000 ft. hard wood, at $2 per M., $200.00; 800 ties, at 5c., $40.00; 30,000 ft. pine, at $5.00, $1.50. Total, $5,490; interest, $4,611.60; whole amount, $10,101.60. April 4, 1883. Reasons for new trial filed. Same day. Rule granted to show cause why verdict should not be set aside and new trial granted. Aug. 20, 1883. Rule granted to show cause why narr. should not be amended; rule returnable 3d Monday of Sept. Feb'y 4, 1884. Opinion of the court filed, and ordered that if plaintiff, within thirty days after the filing of this opinion, shall remit one-half of the amount of damages for which the verdict was rendered then the rule for
5 a new trial will be discharged, and prothonotary is directed to enter judgment upon the verdict thus rendered. If the plaintiff shall neglect or refuse to enter such remitt-ur within thirty days, then the rule for a new trial is made absolute, the verdict set aside, and a new trial granted. April 7, 1884. Rule granted to show cause why the above cause should not be removed to the U. S. circuit court, W. D. of Penna. Same day. Bond approved by the court. April 14, 1884. Defendant objects to removal of case. April 16, 1884. Rule to remove case made absolute and case removed to U. S. circuit court, W. D. of Pennsylvania.

1884, May 5. Exemplification from the court of common pleas of Bradford county, Pa., in above case filed. 1884, September 20. Petition presented and rule granted on plaintiff to show cause why case should not be remanded to State court; returnable October 14, 1884,

at 10 a. m. 1884, October 14. Hearing had upon rule to show cause herein C. A. V. 1884, Oct. 25. Order filed and rule of Sept. 20, 1884, discharged. 1884, October 27. Defendant, by its attorney, except- to the order of court of Oct. 25, 1884, per writing filed. 1884, November 5. Leave granted defendant to file additional plea herein, and additional plea filed accordingly. 1884, Nov'r 10. Depositions *de bene esse* — plaintiff taken before J. W. Mix, U. S. comm'r,
6 filed. 1884, Nov'r 11. Proof of service of notice of filing of additional plea herein filed. 1884, Nov'r 10. On motion of defendant, trial continued over November term at its costs. Same day. Rule on pl'ff to give security for costs in the sum of $2,500; proceedings stayed in meantime. Also same day. Plaintiff's bill of costs filed for this term, taxed by clerk at $736.78. 1884, November 21. Bond for costs filed and same approved by the clerk. 1885, April 22. Depositions *de bene esse* on behalf [of] plaintiff before John W. Mix, U. S. commissioner, filed. April 22. Counsel for plaintiff moves the court to strike off the plea of defendant filed herein Nov'r 5th, 1884; argument had thereon *pro* and *con*, C. A. V. April 22. Affidavits of plaintiff's counsel surabove motion filed. 1885, May 1. Rule granted as of Nov'r 5, 1884, to show cause why defendant should not have leave to file plea of statute of limitations; returnable May 11, 1885, as per order filed. 1885, May 11. Defendant files motion to discharge the rule granted plaintiff, Aug. 20, 1883, to amend the narr. Same day. Hearing had upon rule of May 1st inst., and motion this day argued C. A. V. 1885, May 12. Rule of May 1, 1885, discharged, and motion of defendant to discharge rule of August 20, 1883, denied. 1885, May 15. Case called for trial, jury sworn, and trial proceeded with. May 16.
7 Trial proceeds through this day and the 18th, 19th, 20th, 21st, 22d, 23d, 25th, 26th, 27th, 28th, and 29th of May. May 29th. On motion of the plaintiff's counsel, and by leave of court, the plaintiff's declaration is amended by inserting in the first count thereof the words "five millions feet of hemlock trees" in lieu of the words in said count "of hemlock trees, two million one hundred and seventeen thousand feet." Same day jury returned verdict as follows, viz: We find for the plaintiff upon the plea of *liberum tenementum*, and find the defendant guilty of the trespass charged, and liquidate damages against the defendant and in favor of plaintiff in the sum of eight thousand dollars. Plaintiff'- and defendant's points filed. 1885, June 5. Judgment is hereby entered upon the verdict herein; H. D. Gamble, clerk. 1885, June 12. Bond on writ of error, with approval thereof by Justice Bradley thereon endorsed, filed; also same day copy of writ of error filed. 1885, June 17. Writ of error directing the return into the Supreme Court of the United States of the record and proceedings in this case on the second Monday of October next filed. 1885, September 25. Order filed, bearing date May 29, 1885, that defendant's bill of exceptions be settled and sealed within fifteen days from date, and that forty-eight hours' notice be given plaintiff's counsel of time and place of such sealing; also same day order filed bearing date June 11, 1885, extending time for sealing

8 bill of exceptions for period of thirty days filed; also, same day defendant's bill of exceptions filed, signed, and sealed by Associate Justice Bradley.

9 *Præcipe for Summons.*

In the Court of Common Pleas of Bradford County.

ELISH A. PACKER, MARY E. CROYDER, Guardian of Levey De Witt, Minor Child of J. De Witt, Deceased, and M. W. De Witt, Administrator *D. B. N.* of the Estate of J. De Witt, Deceased, to Use of D. C. De Witt,

vs.

THE SCHRADER MINING AND MANUFACTURING COMPANY, VICTOR E. PIOLLET and JOSEPH E. PIOLLET.

Issue summons against the defendants to answer the plaintiff wherefore, with force and arms, &c., he broke and entered the close of the plaintiff in said county, and then and there cut and felled and removed from plaintiff's said close timber trees, and other wrongs to the plaintiff then and there did, to the great damage of the plaintiff, &c. Returnable to next term.

Yours, &c., S. W. AND WM. LITTLE,
Att'ys for Pl'ff.

To Benj. M. Peck, Esq., prothonotary.
Feb'y 26, 1877.

Endorsed: No. 384. May term, 1877. D. C. DeWitt, use, *vs.* The Schrader M. & M. Co., Victor E. Piolett, Joseph E. Piolett. Summons in trespass. Filed Feb'y 26, 1877. S. W. & W. Little.

10 *Summons.*

To the sheriff of Bradford county, Greeting:

You are hereby commanded to summon The Schrader Mining and Manufacturing Company, Victor E. Piollet and Joseph E. Piollet, to be and appear before our judges of the court of common pleas, to be holden for said county, in the borough of Towanda, on the first Monday of May next, there to answer Elisha A. Packer, Mary E. Cuyder, guardian of Levey De Witt, minor child of J. De Witt, adm'r *D. B. N.* of J. De Witt, dec'd, to use of D. C. De Witt, to answer the plaintiff wherefore, with force and arms, &c., he broke and entered the close of the pl'ff in said county, and then and there cut and felled and removed from pl'ff's said close timber trees, and other wrongs to the plaintiff then and there did, to the great damage of the pl'ff, &c. Hereof fail not.

Witness Hon. Paul D. Morrow, president of our said court, at Towanda aforesaid, the 26 day of Feb., A. D. 1877.

[SEAL.] BENJ. M. PECK,
Prothonotary.

Endorsed: No. 384. May term, 1877. D. C. De Witt's use *vs.* The Schrader Mining and Manufacturing Co., V. E. Piollet and J. E. Piollet. Summons. S. W. & Wm. Little, attorneys for plaintiff.

To the judges:

11 I certify that on March 8, 1877, I served this summons on the within-named Victor E. Piollet and J. E. Piollet, by personally making known to them the contents hereof, and also gave to each of them a true and attested copy of same. Same day served the same on the Schrader Mining & Manufacturing Co., by personally making known to V. E. Piollet, one of the directors of said company, the contents hereof, and also gave to him a true and attested copy of same; and on M'ch 9, 1877, I served same on Joseph Powell, treasurer of said company, by personally making known to him the contents hereof, and I also gave to him a true and attested copy of same.

A. J. LAYTON, *Sh'ff.*

Sworn to March 12, 1877, before me—

B. M. PECK, *Proth'y.*

12 *Declaration.*

In the Court of Common Pleas of Bradford County, of May Term, 1877.

ELISHA A. PACKER and MARY E. CRYDER, Guardian of Lexy De Witt, Minor Child of Jacob De Witt, Deceased, and M. W. DE WITT, Administrator *de bonis non* of Jacob De Witt, Dec'd, to use of D. C. De Witt, } No. ——.

vs.

The "SCHRADER MINING AND MANUFACTURING COMPANY," and VICTOR E. PIOLLET and JOSEPH E. PIOLLET.

BRADFORD COUNTY, *ss:*

The "Schrader Mining and Manufacturing Company" and Victor E. Piollet and Joseph E. Piollet, the def'ts in this suit, were summoned to answer the plaintiff in this suit in a plea of trespass, and thereupon the said plaintiff, by S. W. & Wm. Little, his attorneys, complain against the said defendants, for that whereas the said defendants heretofore, to wit, on the — day of ——, A. D. 188–, and on divers other days and times between that day and the day of bringing this suit, with force and arms, to wit, at Bradford county aforesaid, did br*ake* and enter the close and lands of said pl'ff, situate in the county of Bradford aforesaid, in the township of Overton, surveyed in the warrantee name of George Moore,
13 and bounded and described as follows, viz: Beginning at a post on line of land in the warrantee name of Joseph Betz; thence along said land and land in the warrantee name of Henry Betz north 29° east three hundred and eighteen perches to a hemlock; thence north 16° west two hundred perches to a post; thence south 29° west three hundred and eighteen perches to a post on line of land in warrantee name of Robert Erwin; thence south 61° east two hundred perches to the place of beginning, and then and there did cut down, fell, prostrate, and destroy, and employed other persons to cut down, fell, prostrate, and destroy, timber trees growing upon

8 bill of exceptions for period of thirty days filed; also, same day defendant's bill of exceptions filed, signed, and sealed by Associate Justice Bradley.

9 *Præcipe for Summons.*

In the Court of Common Pleas of Bradford County.

ELISH A. PACKER, MARY E. CROYDER, Guardian of Levey De Witt, Minor Child of J. De Witt, Deceased, and M. W. De Witt, Administrator *D. B. N.* of the Estate of J. De Witt, Deceased, to Use of D. C. De Witt,

vs.

THE SCHRADER MINING AND MANUFACTURING COMPANY, VICTOR E. PIOLLET and JOSEPH E. PIOLLET.

Issue summons against the defendants to answer the plaintiff wherefore, with force and arms, &c., he broke and entered the close of the plaintiff in said county, and then and there cut and felled and removed from plaintiff's said close timber trees, and other wrongs to the plaintiff then and there did, to the great damage of the plaintiff, &c. Returnable to next term.

Yours, &c., S. W. AND WM. LITTLE,
Att'ys for Pl'ff.

To Benj. M. Peck, Esq., prothonotary.
Feb'y 26, 1877.

Endorsed: No. 384. May term, 1877. D. C. DeWitt, use, *vs.* The Schrader M. & M. Co., Victor E. Piolett, Joseph E. Piolett. Summons in trespass. Filed Feb'y 26, 1877. S. W. & W. Little.

10 *Summons.*

To the sheriff of Bradford county, Greeting:

You are hereby commanded to summon The Schrader Mining and Manufacturing Company, Victor E. Piollet and Joseph E. Piollet, to be and appear before our judges of the court of common pleas, to be holden for said county, in the borough of Towanda, on the first Monday of May next, there to answer Elisha A. Packer, Mary E. Cuyder, guardian of Levey De Witt, minor child of J. De Witt, adm'r *D. B. N.* of J. De Witt, dec'd, to use of D. C. De Witt, to answer the plaintiff wherefore, with force and arms, &c., he broke and entered the close of the pl'ff in said county, and then and there cut and felled and removed from pl'ff's said close timber trees, and other wrongs to the plaintiff then and there did, to the great damage of the pl'ff, &c. Hereof fail not.

Witness Hon. Paul D. Morrow, president of our said court, at Towanda aforesaid, the 26 day of Feb., A. D. 1877.

[SEAL.] BENJ. M. PECK,
Prothonotary.

Endorsed: No. 384. May term, 1877. D. C. De Witt's use *vs.* The Schrader Mining and Manufacturing Co., V. E. Piollet and J. E. Piollet. Summons. S. W. & Wm. Little, attorneys for plaintiff.

To the judges:

11 I certify that on March 8, 1877, I served this summons on the within-named Victor E. Piollet and J. E. Piollet, by personally making known to them the contents hereof, and also gave to each of them a true and attested copy of same. Same day served the same on the Schrader Mining & Manufacturing Co., by personally making known to V. E. Piollet, one of the directors of said company, the contents hereof, and also gave to him a true and attested copy of same; and on M'ch 9, 1877, I served same on Joseph Powell, treasurer of said company, by personally making known to him the contents hereof, and I also gave to him a true and attested copy of same.

A. J. LAYTON, *Sh'ff.*

Sworn to March 12, 1877, before me—

B. M. PECK, *Proth'y.*

12 *Declaration.*

In the Court of Common Pleas of Bradford County, of May Term, 1877.

ELISHA A. PACKER and MARY E. CRYDER, Guardian of Lexy De Witt, Minor Child of Jacob De Witt, Deceased, and M. W. DE WITT, Administrator *de bonis non* of Jacob De Witt, Dec'd, to use of D. C. De Witt, } No. ——.

vs.

The "SCHRADER MINING AND MANUFACTURING COMPANY," and VICTOR E. PIOLLET and JOSEPH E. PIOLLET.

BRADFORD COUNTY, *ss:*

The "Schrader Mining and Manufacturing Company" and Victor E. Piollet and Joseph E. Piollet, the def'ts in this suit, were summoned to answer the plaintiff in this suit in a plea of trespass, and thereupon the said plaintiff, by S. W. & Wm. Little, his attorneys, complain against the said defendants, for that whereas the said defendants heretofore, to wit, on the — day of ——, A. D. 188–, and on divers other days and times between that day and the day of bringing this suit, with force and arms, to wit, at Bradford county aforesaid, did br*ake* and enter the close and lands of said pl'ff, situate in the county of Bradford aforesaid, in the township of Overton, surveyed in the warrantee name of George Moore,
13 and bounded and described as follows, viz: Beginning at a post on line of land in the warrantee name of Joseph Betz; thence along said land and land in the warrantee name of Henry Betz north 29° east three hundred and eighteen perches to a hemlock; thence north 16° west two hundred perches to a post; thence south 29° west three hundred and eighteen perches to a post on line of land in warrantee name of Robert Erwin; thence south 61° east two hundred perches to the place of beginning, and then and there did cut down, fell, prostrate, and destroy, and employed other persons to cut down, fell, prostrate, and destroy, timber trees growing upon

the said land of the plaintiff, and without the consent of said plaintiff, to wit, of pine trees, twenty-five thousand feet; of hemlock, two million one hundred and seventeen thousand feet; of hard-wood trees, eighty thousand feet; of maple, three hundred thousand feet, and also eleven hundred cords of bark, which was growing upon said hemlock trees when they were cut and felled as aforesaid, being of great value, to wit, fifteen thousand dollars, and the said defendant did then and there take and carry away and dispose of the same to their own use.

And the said plaintiff, further complaining, says that the said defendants afterwards, to wit, at the day and year aforesaid,
14 and before the bringing of this suit, and at the county of Bradford aforesaid, did receive timber trees, knowing the same to have been cut, felled, and taken away from the said land of the plaintiff and without his consent, to wit, of pine, one hundred trees; of hemlock, three thousand trees; of maple, one thousand five hundred trees; of hard wood, three hundred trees, and of hemlock bark, eleven hundred cords of great value, to wit, of the value of 15 thousand dollars; and the said plaintiffs, further complaining, says that said defendants, at the time before mentioned and between that time and the bringing of this suit at Bradford county aforesaid, did, by cutting, felling, and removing said before-mentioned timber trees, *did* then and there do and commit great injury to the said lands of said plaintiff to the great damage of the said plaintiff and against the provisions of the act of Assembly of 29th March, A. D. 1824, and to the damage of the said plaintiff in the sum of twenty thousand dollars; and therefore he brings this suit.

February 26, 1877.

S. W. & WM. LITTLE,
Att'ys for Pl'ff.

Endorsed: No. 384. May 7, 1877. Elisha A. Packer, Mary E. Cryder, guardian of Lexy De Witt, minor child of J. De Witt, dec'd, & M. W. De Witt, adm'r *D. B. N.* of J. De Witt, to use of D. C. De Witt, *vs.* Schrader M. & M. Co., Victor E. Piollet, Joseph E. Piollet. Declaration filed Feb'y 27, 1877.

15 *Appearance.*

S. C. De Witt, Use,
vs.
Schrader M. & M. Co. & Piollets. } No. 384 May Term, 1877.

And now, to wit, May 10, 1877, defendants appear by Davies & Carnochan, their att'ys.

E-dorsed: No. 384. May term, 1877. D. C. De Witt's use *vs.* Schrader M. & M. Co. & Piollets. Appearance. Filed May 10, 1877.

16 *Nolle Prosequi as to Piollets.*

ELISHA A. PACKER *et al.*, Use D. C. DE WITT,
vs.
SCHRADER M. & M. Co., V. E. & J. E. PIOLLET. } No. 384. May T., 1877.

Trespass under statute before W. J. Young, Allen McKean, — Miller Fox, arb's.

And now, to wit, June 15, 1877, the plaintiff enters a *nolle prosequi* in the above case as to V. E. & J. E. Piollet.

S. W. & WM. LITTLE,
Att'ys for Pl'ff.

Endorsed: No. 384. May T., 1877. D. C. De Witt's use *vs.* Schrader M. & M. Co. *Nolle prosequi.* Filed June 16th, 1877. Rec'd & filed by the arbitrators May 15, 1877. Allen McKean, W. J. Young, — Miller Fox, arb's.

17 *Amendment of Record.*

D. C. DE WITT, Use,
vs.
THE SCHRADER MINING & MANUFACTURING CO.

Now, Dec. 17, 1879, counsel for plaintiff offers to amend the record by striking from the parties plaintiff all names except that of Elisha A. Packer, so that the suit will stand Elisha A. Packer *vs.* The Schrader Mining & Manufacturing Company.

Endorsed: No. 384. May T., 1877. D. C. De Witt, use, *vs.* Schrader M. & M. Co. Amendment allowed Dec. 17, 1879, by the court. Filed Dec. 17, 1879.

18 *Additional Plea.*

E. A. PACKER
vs.
SCHRADER M. & M. Co. } No. 384. May T., 1877.

Now, Dec. 17, 1879, the record having been amended by leave of the court, the defendant, by leave of court, adds the plea by *liberum tenementum.*

SANDERSON, DAVIES & CORNACHAN,
For Defendant.

Endorsed: No. 384. May term, 1877. Allowed to be filed Dec. 17, 1879, on motion of defendant's counsel, by the court. Filed Dec'r 17, 1879.

19 *Amendment to Narr.*

E. A. PACKER
vs.
MINING & MANUFACTURING COMPANY. } No. 384. May Term, 1877.

Now, February 16, 1880, plaintiff asks to amend narr. by striking

out "against the provisions of the act of Assembly of the 29th March, A. D. 1824."

L. M. HALL.

Endorsed: No. 384. May term, 1877. E. A. Packer *vs.* The Schrader Mining & Man'f'g Co. Allowed Feb. 16, 1880, on motion of Hall for pl'ff, by the court. Filed Feb'y 16, 1880.

20 *Petition to Remove Cause.*

In the Court of Common Pleas of Bradford Co. May Term, 1877.

ELISHA A. PACKER
vs.
THE SCHRADER MINING & MANUFACTURING CO. } No. 384.

To the Honorable Paul D. Morrow, president judge of the court of common pleas of Bradford county:

The petition of E. A. Packer, a citizen of the city of New York and of the State of New York, the above-named plaintiff, respectfully shows that he is plaintiff in the above-entitled suit, and that the same was commenced on or about the 26th day of February, A. D. 1877, to No. 384, May term, 1877, in the court of common pleas of Bradford county; that your petitioner was, at the time of the bringing of said suit, and still is, a citizen of the city of New York, in the State of New York, and a resident thereof; that said action was brought for the purpose of recovering from the said Schrader Mining & Manufacturing Co., the defendant, damages for timber cut and felled and removed from the following tract of land situate in Overton township, Bradford county, Pennsylvania, and described as follows:

Beginning at a post on line of lands in the warrantee of
21 Joseph Betz, thence along said land and land in the warrantee-name of Henry Betz, north 29 degrees east three hundred [and] eighteen perches to a hemlock; thence north 61 degrees west two hundred perches to a post; thence north 29 degrees west three hundred [and] eighteen perches to a post on line of lands in warrantee-name of Robert Irwin; thence south 61 degrees east two hundred perches to the place of beginning.

That the matter in dispute in said suit exceeds the sum of five hundred dollars, exclusive of costs; that the said defendant is a corporation of Towanda, in the State of Pennsylvania; was at the time of this suit being instituted and is now; the controversy in said suit is between a citizen of one State and a corporation of different State.

Your petitioner further states that said suit has been tried three times, but no verdict has been allowed to stand, and said suit is now pending for trial in the court of common pleas of Bradford county aforesaid, and that he desires to remove the same into the circuit court of the United States for the western district of Pennsylvania, in pursuance of the statute in the behalf provided, to wit, subdivision 3, section 639, of the Revised Statutes of the United States.

Your petitioner further states that he has filed herewith the affi-

davit required by the statute in such cases and offered his
22 bond, executed by George W. Ennis, citizen of the State of Pennsylvania, with good and sufficient sureties, in the penal sum of one thousand dollars, as required by said statutes on the removal of a cause.

Your petitioner therefore prays that the said bond may be accepted as good and sufficient, and that the said suit may be removed into the next circuit court of the United States in and for the said district of western Pennsylvania pursuant to the statute aforesaid, and that no further proceedings be had in this court.

STATE OF NEW YORK, *City of New York:*

In the Court of Common Pleas of Bradford Co. May Te-m, 1877.

ELISHA A. PACKER
vs.
THE SCHRADER MINING & MANUFACTURING CO. } No. 384.

I, Elisha A. Packer, being duly sworn, do say that I am the plaintiff in the above-entitled cause; that I have read the foregoing petition and know the contents thereof; that the statements and allegations — contained are true as, I verily believe; and, further, that I have reason to believe and do believe that from prejudice and
23 local influence I will not be able to obtain justice in said State court.

(Signed) E. A. PACKER.

Subscribed by the said Elisha A. Packer in my presence, and by him sworn to before me, at New York city, N. Y., this the tenth day of March, A. D. 1884.

In witness whereof I have hereunto set my hand and affixed my official seal this 10th day of March, A. D. 1884.

[SEAL.] (Signed) CHARLES NETTLETON,
Commissioner for Pennsylvania in New York,
115 & 117 *Broadway, N. Y. City.*

At a term of the court of common pleas, in and for the county of Bradford, held at Towanda, on the 16th day of April, A. D. 1884—present, Hon. Paul D. Morrow, president judge of the court of common pleas for the county of Bradford.

E. A. PACKER
vs.
THE SCHRADER MINING & MANUFACTURING CO. } No. 384. May T., 1877.

On pleadings and proceedings herein and on the petition and bond filed herein by the plaintiff, under the statutes of the United States, and on motion of James Ryon and D. C. DeWitt, plaintiff's attorney, it is ordered that the security afforded by the plaintiff be accepted and said bond approved, and that the State court
24 proceed no further in this cause, and that this cause be re-

moved into the United States circuit court in and for the western district of Pennsylvania.

GEORGE W. BLACKMAN,
Prothonotary.

Bond.

Know all men by these presents that we, Elisha A. Packer, of the city of New York, in the State of New York, and George W. Ennis, of the borough of Towanda, Bradford county and State of Pennsylvania, are jointly and severally held and firmly bound unto the Schrader Mining and Manufacturing Co., of Towanda, Pennsylvania, in the sum of one thousand dollars; for which, well and truly to be paid unto said Schrader Mining & Manufacturing Co., their successors and assigns, we do bind ourselves, our heirs, executors, assigns, and administrators, jointly by these presents.

Sealed with our seals this the 10th day of March, A. D. 1884.

The condition of this obligation is such that if the said Elisha A. Packer, plaintiff in the suit now pending in the court of common pleas of Bradford county, in the State of Pennsylvania, to No. 384, May term, 1877, shall on the first day of the next session or term of the circuit court of the United States for the western
25 district of Pennsylvania enter a copy of the record in the said suit and all copies of all process, pleadings, depositions, testimony, and other proceedings, enter the appearance of the said Elisha A. Packer in the said circuit court of the United States, and pay all costs that may be awarded against him by said circuit court, if such court shall hold that said suit was wrongfully and improperly removed from said State court, then this obligation to be void; otherwise to remain in full force and effect.

In witness whereof the said obligators have hereunto set their hands and seals this the 10th day of March, A. D. 1884.

E. A. PACKER. [SEAL.]
GEO. W. ENNIS. [SEAL.]

STATE OF NEW YORK, *City & County of New York:*

Be it remembered that on this tenth day of March, A. D. 1884, before me, the subscriber, a commissioner of the State of Pennsylvania to take the acknowledgment of deeds, &c., personally appeared Elisha A. Packer, who in due form of law acknowledged the foregoing instrument to be his act and deed, and desired the same to be recorded as such.

In witness whereof I have hereunto set my hand and affixed my official seal this 10th day of March, A. D. 1884.

CHARLES NETTLETON,
26 *Commissioner for Pennsylvania in New York,*
115 & 117 *Broadway, N. Y. City.*

STATE OF PENNSYLVANIA, } ss:
County of Bradford, }

On this, the first day of April, A. D. 1884, before me personally appeared George W. Ennis, to me personally known *to me* to be the

person who executed the foregoing bond, and acknowledged that he executed the same for the uses and purposes therein mentioned.

STATE OF PENNSYLVANIA, } ss:
County of Bradford, }

I, Geo. W. Ennis, the surety named in the foregoing bond, being duly sworn, do depose and say that I am a resident of the State of Pennsylvania, and am a property holder therein; that I am worth the sum of one thousand dollars over and above all debts and liabilities and exclusive of property by law exempt from execution, and that I *am* property in the State of Pennsylvania liable to execution of the value of more than one thousand dollars.

GEO. W. ENNIS.

Subscribed in my presence by Geo. W. Ennis and by him sworn to before me this the second day of April, A. D. 1884.

CHAS. M. HALL, *J. P.* [SEAL.]

27 Indorsed: No. 384. May T. 1877. E. A. Packer *vs.* The Schrader Mining & Manufacturing Co. Filed April 7, 1884.

Now, April 7, 1884, the court grant a rule to show cause why the within-named case shall not be certified to the United States circuit court for the west. dist. of Penna., returnable April 14, 1884. The within bond approved by the court.

P. D. MORROW, *J. P.*

Objections to Removal of Cause.

PACKER
vs.
THE SCHRADER M. & M. Co. } No. 384. May T., 1877.

And now, April 14, 1884, on return of rule to show cause why this cause shall not be removed to the circuit court of the United States, the defendant objects to said removal on the ground that the application for the removal was not made before or at the time at which the cause could first be tried, and that the suit was brought to use of D. C. De Witt, a citizen of Pennsylvania.

DAVIES, OVERTON AND SANDERSON,
Att'ys for Def't.

28 Ordered to be filed April 14, 1884.
By the court:

P. D. MORROW, *P. J.*

Indorsed: No. 384. May Term, 1877. E. A. Packer vs. Schrader M. & M. Co. Filed April 14, 1884.

Order for Removal.

E. A. PACKER *vs.* SCHRADER MIN. &. MAN'F. CO.

Rule to remove this cause to the circuit court of the U. S. for the western district of Pennsylvania is made absolute.

By the court:

P. D. MORROW, *P. J.*

Indorsed: No. 384. May T., 1877. Packer *vs.* Schrader. Filed April 16, 1884.

29 *Precipe for Appearance for Pl'ff.*

In the Circuit Court of the United States for the Western District of Pennsylvania. May T., 1884.

E. A. PACKER
vs.
THE SCHRADER M. & M. CO. } No. 45.

Now, May 2, 1884, we enter our appearance for the plaintiff.

JAMES RYON,
Pottsville, Pa.
D. C. DE WITT,
Towanda, Pa.

To H. D. Gamble, Esq., clerk U. S. cir. c't.

Indorsed: No. 45. May term, 1884. Elisha A. Packer *vs.* The Schrader Mining & Manufacturing Co. Precipe for appearance. Filed May 5, 1884.

30 *Precipe for Appearance for Def't.*

In the Circuit Court of the United States for the Western District of Pennsylvania.

E. A. PACKER
vs.
THE SCHRADER MINING & MANUFACTURING COMPANY.

Enter my appearance *de bene esse* for the defendant.

W. T. DAVIES,
Att'y for Def't.

To H. D. Gamble, Esq., clerk, Pittsburgh, Pa.
June 10, 1884.

Indorsed: No. 45. May term, 1884. Packer *vs.* Schrader Mining and Manufacturing Co. Appearance for defendant by W. T. Davies, Towanda, Pa. Filed June 11, 1884.

31 *Petition to Remand Cause.*

In the Circuit Court of the United States for the Western District of Pennsylvania.

E. A. PACKER *vs.* SCHRADER MINING & MANUFACTURING COMPANY.

Petition for order to remand the cause to the State court.

To the honorable the judges of said court:

The petition of the Schrader Mining and Manufacturing Company, the defendant corporation, respectfully showeth that this cause was originally brought in the court of common pleas of Bradford county, Pennsylvania, to No. 384, May term, 1877, by a summons in trespass *quare clausam frigit*, issued Feb'y 26, 1877; that the parties plaintiff in the said cause as then and there brought were Elisha A. Packer, Mary E. Cryder, guardian of Lexy De Witt, minor child of J. De Witt, deceased, and M. W. De Witt, administrator of the estate of J. De Witt, deceased, to the use of D. C. De Witt, against the present defendant, and Victor E. Piollet and J. E. Piollet; that Mary E. Cryder, guardian of Lexy De Witt; M. W. De Witt, and D. C. De Witt were all on the said 26th day of February, 1877, citizens of the State of Pennsylvania. A rule of reference to arbitra-
32 tors under the compulsory arbitration law of Pennsylvania was entered on that day. June 16, 1877, a *nolle prosequi* was entered as to Victor E. Piollet and J. E. Piollet, and the same day an award of arbitrators was filed, from which an appeal was taken June 16, 1877. Dec. 15, 1879, the case came on for trial before a jury in the said court of common pleas. Dec. 17, 1879, on application of plaintiff the court amended the record by striking from the parties plaintiff all the names, except that of Elisha A. Packer, so that the suit then stood in the name of Elisha A. Packer, plaintiff, against the petitioner as defendant; that on the same day D. C. De Witt filed an affidavit explaining how the said suit came to be brought as it was brought, a copy of which affidavit is hereto annexed and referred to. Upon the granting of said amendment, the defendants pleading surprise, the case was continued. Feb. 12, 1880, the cause again came on for trial, and a jury was sworn. Feb. 16, 1880, on motion of plaintiff, the narr. was amended by striking out "Against the provisions of the act of Assembly of the 29th of March, A. D. 1824." Feb. 17, 1880, a verdict was rendered, and April 5, 1880, judgment for defendant was entered thereon. April 14, 1880, a writ of error from the supreme court of Pennsylvania was sued out, and the same was so proceeded
33 in that the judgment of the court below was reversed, and a *venire facias de novo* awarded. Aug. 31, 1882, the cause again came on for trial before a jury, and on Sept. 6, 1882, a verdict was rendered for the plaintiff, and on application of defendant a new trial was granted. M'ch 27, 1883, the cause again came on for trial before a jury in said court, and on April 4, 1883, a verdict was rendered for the plaintiff. Feb. 4, 1884, an order of the court was filed, directing a new trial to be had unless within thirty days the plain-

tiff should remit one-half the amount for which the verdict was rendered, and the order for new trial became absolute on the plaintiff failing so to do.

Your petitioner therefore, showing that the decedent, Jacob De Witt, was at the time of his death a citizen of Pennsylvania; that M. W. DeWitt, his administrator, was at the time this suit was brought and up to the date of his death, about one year ago, a citizen of Pennsylvania, holding letters on said estate from the orphans' court of Bradford county; that Mary E. Cryder and Lexy DeWitt were, when this suit was brought, and have been ever since, and are now, citizens of Pennsylvania; that D. C. DeWitt was, when said suit was brought, and ever since has been, and is now, a citizen of Penn-
34 sylvania, and, as your petitioner verily believes, has still a joint interest with the said E. A. Packer in the claim sued upon, and that the said application to remove this cause was not made until after three verdicts had been rendered, and not before or at the term at which the cause could first be tried, prays the court to grant a rule to show cause why this cause shall not be remanded to the State court, and upon hearing said rule to remand the same.

JOSEPH POWELL.

UNITED STATES OF AMERICA, *Western District of Penna.*, } ss:

Joseph Powell, the agent and secretary and treasurer of the Schrader Mining and Manufacturing Company, being duly sworn, says he has read the foregoing petition and knows the contents thereof, and that the averments thereof are true according to the best of his knowledge and belief.

JOSEPH POWELL.

Sworn and subscribed before me this 21st day of June, A. D. 1884.

GEO. W. BLACKMAN, *Prot.*

(*Copy of Precipe.*)

In the Court of Common Pleas of Bradford County.

ELISHA A. PACKER, MARY E. CRYDER, Guardian of Lexy De
35 Witt, Minor Child of J. De Witt, Deceased, and M. W. De Witt, Administrator, *D. B. N.* of the Estate of J. De Witt, Deceased, to the use of D. C. De Witt.

vs.

THE SCHRADER MINING AND MANUFACTURING COMPANY, VICTOR E. PIOLLET and JOSEPH E. PIOLETT.

Issue summons against the defendants to answer the plaintiff wherefore with force and arms, &c., he broke and entered the close of the plaintiff in said county and then and there cut, felled, and removed from plaintiffs said close timber, trees, and other wrongs

to the plaintiff then and there did, to the great damage of the plaintiff, &c.

Returnable to next term.

Yours, &c.,

(S'g'd) S. W. & WM. LITTLE,
Att'ys for Pl'ff.

To Benj. M. Peck, Esq., prothonotary.
Feb'y 26, 1877.

BRADFORD COUNTY, *ss:*

Common Pleas, Bradford County. May T., 1877.

E. A. PACKER *et al.*, to use of D. C. De Witt,
vs.
THE SCHRADER M. & M. Co. } No. 384.

D. C. De Witt, being duly sworn according to law, says: In 1876 talked with H. T. Maynard and S. W. Little about bringing suit against the above defendant for trespassing on the George
36 Moore tract. I informed them that I had an assignment from the De Witt estate; that E. A. Packer and myself were equally interested in the claim against said def'ts for said trespass; that Mr. Packer owned the land while a portion of the trespass was committed; and that the land was then conveyed to J. De Witt; that the def'ts continued to trespass after De Witt owned the land; that some of the timber was cut while Packer owned the land, and taken away after De Witt owned it. After consultation, we concluded it was a continuous trespass. I having an assignment from the estate of J. De Witt and power to bring suit in name of E. A. Packer to my use for the trespass committed while he owned the land, that damages could be recovered in one suit; that deponent was taken very sick on Jan. 19, 1877, and was confined to the house for about one month, and was unable to transact business until in March; that during this time Mr. Little, by my orders, commenced this suit; that deponent did not intend to bring suit for an injury or trespass to the land when jointly owned by Jacob De Witt and E. A. Packer; that deponent did not understand that they ever did own it together, and if the declaration is so drawn it is a mistake.

Deponent further says the names of Mary E. Cryder, guardian,
37 &c., and M. W. De Witt were placed upon the record in good faith and with an honest opinion that they could be included in the suit, and not for the purpose of injuring defendants or precluding them from giving any testimony that they would have been allowed to give if separate suits had been brought; that under the ruling of his honor, Judge Morrow, in this case deponent was mistaken in the law.

(S'g'd) D. C. DE WITT.

Swo. & sub. to Dec. 17, 1879.

GEO. W. BLACKMAN, *Proth'y.*

And now, Sept. 20, 1884, on reading within petition, and on mo-

tion, the court grants a rule on plaintiff to show cause why the cause should not be remanded to the State court. Returnable 14th Oct., 1884, at 10 o'clock a. m.

By the court.

Indorsed: No. 45. May term, 1884. Elisha A. Packer *vs.* The Schrader Mining & Manufacturing Co. Petition for order to remand to State courts. Filed Sept. 20, 1884. H. D. Gamble, clerk.

38 *Order Discharging Rule to Remand.*

In the Circuit Court of the United States for the Western District of Pennsylvania. May Term, 1884.

ELISHA A. PACKER
vs.
THE SCHRADER MINING AND MANUFACTURING COMPANY. } No. 45.

Surrule *ex parte* defendant to show cause why this case should not be remanded to the State court.

Argued Oct. 14, 1884, C. A. V.

And now, Oct. 25th, 1884, upon due consideration, the rule granted Sept. 20th, 1884, to show cause why this cause should not be remanded to the State court is discharged.

By the court.

Indorsed: No. 45. May term, 1884. Elisha A. Packer *vs.* The Schrader Mining & Manufacturing Company. Order discharging rule to show cause why this cause should not be remanded to the State court. Filed Oct. 25, 1884.

39 *Def't's Exceptions to Order Discharging Rule to Remand.*

In the Circuit Court of the United States for the Western District of Pennsylvania. May Term, 1884.

ELISHA A. PACKER
vs.
THE SCHRADER MINING AND MANUFACTURING CO. } No. 45.

Now, Oct. 27th, 1884, defendant excepts to the order of the court of Oct. 25th, 1884, discharging the rule to show cause why this cause should not be remanded to the State court.

W. T. DAVIES,
Attorney for Defendant.

Reasons:

1. The application for the removal was not made in time.
2. All the parties plaintiff in this suit are not citizens of other States than the State of Pennsylvania, but some of them are citizens of said State of Pennsylvania.

Indorsed: No. 45. May term, 1884. Elisha A. Packer *vs.* The Schrader Mining & Manuf'g Co. Defendant's exception to order of Oct. 25, 1884. Filed Oct. 27, 1884. W. T. Davies.

40 *Def't's Additional Plea.*

In the Circuit Court of the United States for the Western District of Pennsylvania. May Term, 1884.

ELISHA A. PACKER
vs.
THE SCHRADER MINING & MAN'F'G CO. } No. 45.

And for a further plea in his behalf as to the said supposed trespasses the said defendant, by leave of the court here for this purpose first had and obtained, saith that the said plaintiff ought not to have or maintain his aforesaid action against him, because he saith that he, the said defendant, was not guilty of the said several supposed trespasses in the said declaration mentioned, or any of them, or of any part thereof, in manner and form as the said plaintiff hath above thereof complained against him, at any time within six years next before the commencement of this suit; and this the said defendant is ready to verify. Wherefore he prays judgment whether the said plaintiff ought to have or maintain his aforesaid action against him.

W. T. DAVIES,
Attorney for Def't.

Indorsed: No. 45. May term, 1884. Elisha A. Packer *vs.* The Schrader M. & M. Co. Defendant's additional plea. Filed Nov'r 5, 1884. W. T. Davies. 1884, Nov'r 5. Leave granted defendant to file within plea. By the court. H. D. Gamble, cl'k.

41 *Order. In Re Plea of Statue of Limitations.*

In the Circuit Court of the the United States for the Western District of Pennsylvania. May Term, 1884.

ELISHA A. PACKER
vs.
THE SCHRADER M. & M. CO. } No. 45.

April 22, 1885, motion *ex parte* plaintiff for a rule to show cause why the plea of the statutes of limitations should not be stricken from the record.

Eo die: Argued C. A. V.

And now, May 1, 1885, it appearing to the court that the order of Nov. 5, 1884, granting the defendant leave to file the plea of the statute of limitations was inconsiderately made upon an *ex parte* application, said order is now rescinded, and in lieu thereof a rule is granted as of Nov'r 5, 1884, upon the plaintiff to show cause why leave should not be granted to the defendent to file said plea, returnable to May 11, 1885.

By the court.

Indorsed: No. 45. May term, 1884. Elisha A. Packer *vs.* The

Schrader M. & M. Co. In the matter of the plea of the statute of limitations. Order. Filed May 1, 1885.

42 *Amendment to Declaration.*

In the Circuit Court of the United States for the Western District of Pennsylvania. May T., 1884.

ELISHA A. PACKER
vs.
SCHRADER M. & M. Co. } No. 45.

And now, to wit, May 29, 1885, by leave of court first had and obtained, the first count of the declaration is amended as follows: By inserting therein the words "five millions feet of hemlock trees" in lieu of the words in said count "of hemlock trees two millions one hundred and seventeen thousand feet."

By the court:

H. D. GAMBLE, *Clerk.*

Indorsed: No. 45. May term, 1884. Elisha A. Packer *vs.* Schrader Mining & Manf'g Co. Order allowing an amendment to the declaration. Filed May 29, 1885.

43 *Plaintiff's Points.*

In the Circuit Court of the United States for the Western District of Pennsylvania. May Term, 1884.

E. A. PACKER
vs.
SCHRADER M. & M. Co. } No. 45.

The plaintiff respectfully requests the court to charge the jury as follows:

1st. The evidence shows that the George Moore survey was regularly returned to the land office, accepted, and patented, and if the jury believes that the hemlock proved to be upon the ground is the hemlock corner called for as the northeast corner of the George Moore; that the south line of said survey was marked upon the ground, and that the calls for adjoining lands are consistent with such marks, the jury in such case must locate the George Moore upon the ground by running the same from the hemlock the northeast corner, the courses called for in the return of survey, so as to answer its calls for the Betz on the east and the Broadhead lands on the west. Such location will embrace within the lines of the George Moore the lands in dispute.

2d. The plaintiff has shown a legal and valid title to all the
44 lands within the lines of the George Moore survey, made in pursuance of warrant, dated the 27th day of April, 1792, and the plaintiff is entitled to recover damages for all trespasses committed upon said lands while he was the owner thereof by said defendant or by the authority and direction by said defendant, or for

the benefit of said defendant, and subsequently ratified or approved of by said defendant.

3d. If the jury believe that in the fall of 1867 the Schrader Land Company, a voluntary association of individuals, entered upon the lands of the plaintiff and caused to be cut down and felled a large quantity of hemlock and other timber trees, and caused the same to be cut into logs and barked, along the Schrader creek, which passes through plaintiff's land, and that afterwards the Schrader Land Company procured an act of incorporation and became an incorporated body under the name and style of the Schrader Mining & Manufacturing Company, and after such incorporation, in the spring of 1868, the said incorporation took and carried away the logs so cut and piled up, and converted the same to the use of said corporation, the plaintiff is entitled to a verdict for the value of said logs so taken, and also for all other timber severed from said land while the plaintiff was the owner thereof, and taken by the defendant before
45 as well as after the first of October, 1870.

4th. If the jury find that the Schrader Land Company, a voluntary association, enters into a contract with the Towanda Tanning Company to sell the bark upon the trees growing and standing upon the George Moore tract, and that said tanning company cut down a large number of timber trees on the said tract and stripped the bark therefrom, and that the Schrader Land Company afterwards became an incorporated company under the name of The Schrader Mining and Manufacturing Company, and as such succeeded to the property rights of the Schrader Land Company; that after such incorporation the bark was removed from the plaintiff's land with the consent and approval of the defendant; that the defendant, claiming to succeed the Schrader Land Company, demanded the performance of the contract, measured the bark, claimed, and received the contract price for said bark, the plaintiff is entitled to a verdict for the value of the bark on the trees, and such value cannot be less than the defendants received for the same.

5th. For such amount of damages as the jury may find the plaintiff to have sustained by reason of the trespasses mentioned and referred to in the preceding points the plaintiff is entitled to in-
46 terest from the time such trespasses were committed up to this time.

6th. That under all the evidence in the case the plaintiff is entitled to a verdict.

Indorsed: No. 45. May term, 1884. Packer *vs.* Schrader Mining & Man'f'g Co. Plaintiff's points. Filed May 29, 1885.

47 *Defendant's Points.*

In the Circuit Court of the United States for the Western District of Pennsylvania.

PACKER *vs.* SCHRADER M. & M. Co.

Counsel for defendant respectfully request the court to charge the jury—

1. That if the jury believe the George Moore warrant, together with the Cooley and others to the south of it, were surveyed as one block, of which the Moore was the northern member—that the north line of said block, as actually surveyed upon the ground in 1792, was run between the hemlock sapling and sugar corners corresponding to what is claimed by the defendant to be the south line of the Andrew Tybout tract—the plaintiff has no title to the part of the land north of the said south line of the Tybout tract, and cannot recover, provided the jury believe the Tybout tract was actually surveyed and located upon the ground, as claimed by the defendants.

2. That if the jury believe that no line of 1792 was surveyed on the grounds for the Moore warrant north from the hemlock sapling corner and west from the hemlock claimed by defendant to be be the northeast corner of the Tybout tract, and that the line
48 from the hemlock northeast corner aforesaid south to the sugar corner was run for warrants east of said line, and that said line was adopted by the return of survey of the Moore, such adoption will not avail to extend the Moore north of the line between the hemlock sapling and the sugar, provided the jury believe the last-mentioned line was the northern limit of the Moore block of surveys, and the Tybout was surveyed, as claimed by the defendant.

3. That as the evidence shows the Tybout tract was surveyed March 24, 1794, within two years of the date of survey of the Moore, and as the Tybout survey was duly returned, patent issued, and chain of title asserted thereunder up to the present time, and as twenty-one years did not elapse between the Moore and Tybout surveys, the presumption that the Moore was actually surveyed as returned is not conclusive, but may be rebutted by evidence.

4. That if the jury believe Jacob DeWitt had charge of Packer's lands, and was authorized to protect them from depredation, and had knowledge of defendant's claim of title up to the painted line, and of the painting of said line in assertion of such claim, and that said Jacob De Witt did not object to the painting of said line, but
49 acquiesced therein and assented thereto, the jury would be warranted in finding the actual possession of the disputed lands to have been in the defendant when the alleged trespasses were committed, provided they believe the evidence of the defendant as to the surveys and other acts of ownership done upon the ground by the defendant, together with payment of taxes; and if they do so find the actual possession to have been in the defendant, the plaintiff cannot recover.

5th. That if the jury believe that Packer authorized Jacob De Witt to establish the Tybout line, as painted, or subsequently consented to such establishment, and that the same was established in good faith, the plaintiff cannot recover.

6. That if the jury believe Jacob De Witt had charge of Packer's lands, and was authorized to protect them from depredations, and in pursuance of such charge and authority consented to the establishment of the painted line, and the defendant in good faith, relying on such consent, took the timber, the plaintiff cannot recover.

7. That the conveyance from Packer to De Witt took effect from Nov. 2, 1869, for all the purposes of this case.

8. That there can be no recovery in this case for timber removed from the disputed territory subsequent to Nov'r 2, 1869.

50 9. That there can be no recovery in this case for the acts done upon and bark removed from the disputed territory by the Towanda Tanning Co. under color of its conveyance of the bark on the Schrader land from the Schrader Land Co.

Indorsed: No. 45. May term, 1884. Packer *vs.* Schrader Mining and Man'f'g Co. Defendant's points. Filed May 29, 1885.

51 *Minutes of Trial.*

In the Circuit Court of the United States for the Western District of Pennsylvania. May Term, 1884.

ELISHA A. PACKER
vs.
THE SCHRADER MINING AND MANUFACTURING COMPANY. } No. 45.

And now, to wit, May 15, 1885, the above cause having come on for trial, a jury was called, viz., David Farrell, John Thompson, W. S. Patterson, H. C. Tussy, W. E. Reed, W. H. Chambers, S. B. Bishop, H. M. Donahoo, David Shallenberger, Edward S. Keel, R. C. Duncan, and Samuel Coleman, twelve good and lawful men, who, having been duly summoned, were balloted for and sworn to well and truly try this issue joined, &c., &c. Thereupon plaintiff, by D. C. De Witt, Esq., one of his counsel, opens case to jury and evidence is offered on his behalf, resting on May 21, when John F. Sanderson, Esq., of counsel for defendant, opens case on behalf of defendant and offers evidence, resting on May 27; thereupon plaintiff offers rebutting evidence, which is followed by surrebutting evidence on part of defendant. Counsel announce to the court on May 28 that the evidence in the case is closed. After the arguments of the counsel for the respective parties the court on May 29 charges the jury, who retire, and, after due deliberation, find for the plaintiff upon the plea of *liberum tenementum*, and find the defendant guilty of the trespass charged, and liquidate damages against the defendant in the sum of eight thousand dollars in favor of plaintiff.

H. D. GAMBLE, *Clk.*

1885, June 5. Judgment is hereby entered upon the verdict herein.

H. D. GAMBLE, *Clk.*

52 *Judgment Docket Entry.*

No.	Term.	Year.	Defendant.	Plaintiff.	Date of judg'm't.	Amount.	Int. from—
45	May ...	1884	Schrader Mining & Manufacturing Co.	Elisha A. Packer.	June 5, 1885	$8,000 00	May 29, 1885

D. C. DEWITT.

53 *Order as to Sealing of Bills of Exceptions.*

Circuit Court of the United States for the Western District of Pennsylvania.

ELISHA A. PACKER
vs.
SCHRADER MINING AND MANUFACTURING COMPANY.

And now, to wit, May 29, 1885, on motion of Mr. Sanderson, of counsel for defendant, it is ordered that defendant's bills of exceptions be settled and sealed within fifteen days from this date, and that forty-eight hours' notice be given plaintiff's counsel of the time and place of such settling and sealing, and that such notice be accompanied by a draft of the bills to be tendered for sealing.

J. P. BRADLEY.

Indorsed: No. 45. May Term, 1884. Elisha A. Packer *vs.* Schrader Mining & Man'f'g Co. Order fixing time for sealing defendant's bill of exceptions, &c. Dated May 29, 1885. Filed Sept. 25, 1885.

54 *Order Extending Time for Sealing Bill of Exceptions.*

Circuit Court of the United States for the Western District of Pennsylvania.

ELISHA A. PACKER
vs.
THE SCHRADER MINING AND MANUFACTURING COMPANY.

In trespass.

An order of the court having heretofore been made allowing the defendant fifteen days from the time the verdict was rendered in this case (namely, 29th May, 1885) to prepare and present its bill of exceptions, and the bill being now presented, but objected to in some particulars by the attorney of the plaintiff, and the parties desiring further time for perfecting the said bill, it is ordered that the defendant have thirty days from the date of this order to perfect said bill, and present the same to one of the judges for signing and sealing, and that the plaintiff's attorney do submit the corrections or additions desired by him to the defendant's attorney within fifteen days from this date.

JOSEPH P. BRADLEY,
Asso. Justice Sup. C't U. S.

This order made June 11, 1885, and delivered to Mr. Sanderson.

J. P. BRADLEY.

Indorsed: Order extending time for sealing bill of exceptions. Dated June 11, 1885. Filed Sept. 25, 1885.

55 *Bond.*

Supreme Court of the United States.

SCHRADER MINING AND MANUFACTURING COMPANY
vs.
ELISHA A. PACKER.

Know all men by these presents that we, the Schrader Mining and Manufacturing Company, Robert H. Sayre, of Bethlehem, Pennsylvania, and Joseph Powell, of Towanda, Pennsylvania, are held and firmly bound unto Elisha A. Packer, of the city and State of New York, in the sum of thirty thousand dollars, to be paid to the said Elisha A. Packer, his executors or administrators; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and each of our successors, heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this eighth day of June, A. D. 1885.

Whereas the above-named Schrader Mining and Manufacturing Company hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in an action prosecuted by the said Elisha A. Packer against the said Schrader Mining and Manufacturing Company in the circuit court of the United States holden in the western district of Pennsylvania;

56 Now the condition of this obligation is such that if the above-named Schrader Mining and Manufacturing Company shall prosecute its said writ of error to effect, and answer all costs and damages if it fail to make good its plea, then this obligation to be void; otherwise to remain in full force and virtue.

[SEAL.] THE SCHRADER MINING & MANUFACTURING CO.,
By ROBERT H. SAYRE, *President.*

Attest: JOSEPH POWELL, *Sec'y.*

ROBT. H. SAYRE. [SEAL.]
JOSEPH POWELL. [SEAL.]

COMMONWEALTH OF PENNSYLVANIA, *ss:*

Personally appeared before me the above-named Robt. H. Sayre, who, being duly sworn according to law, deposes and says that he is worth in real estate, above all his debts and liabilities, at least thirty thousand dollars.

ROBT. H. SAYRE.

Sworn and subscribed to this 8th day of June, 1885.

[SEAL.] JOHN C. WEBER,
Notary Public.

COMMONWEALTH OF PENNSYLVANIA, *ss:*

Personally appeared before me the above-named Joseph Powell, who, being duly sworn according to law, deposes and says he is

worth in real estate, above all his debts and liabilities, at least thirty thousand dollars.

57 JOSEPH POWELL.

Sworn and subscribed to this 9th day of June, 1885.

[SEAL.] JNO. W. MIX,
U. S. Commissioner in & for West. Dist. of Pa.

The foregoing bond is approved by me.
June 11, 1885.

JOSEPH P. BRADLEY,
Asso. Justice Sup. Ct. U. S.

Indorsed: No. 45. May term, 1884. Packer *vs.* Schrader Mining & Manufacturing Company. Bond. Filed June 12, 1885.

58 *Bill of Exceptions.*

Circuit Court of the United States, Western District of Pennsylvania.
May Term, 1884.

ELISHA A. PACKER
vs.
SCHRADER MINING AND MANUFACTURING COMPANY. } No. 44.

Be it remembered that the plaintiff, having declared against the defendant and impleaded it in a plea of trespass *quare clausam fregit* (*prout narr*), and thereto the defendant having pleaded not guilty and *liberum tenementum prout* pleas and issue, and issue having been joined thereon in the court of common pleas of Bradford county, Pennsylvania, and the said cause having been removed into this court (*prout* record and proceedings for removal), afterwards, to wit, May 15, 1885, before Honorable Joseph P. Bradley, justice of the Supreme Court of the United States, sitting as circuit justice, and Honorable William McKennan, circuit judge, the said issues came on to be tried by a jury, and a jury having been duly empanneled and sworn, the plaintiff proceeded to deduce title to the
59 *locus in quo* (*prout narr*) by producing in evidence warrant of survey from the Commonwealth of Pennsylvania to survey for one George Moore a tract of land of four hundred acres, adjoining or near lands granted on the day of the date of said warrant to Samuel Temple, in the county of Northumberland, the said warrant bearing date April 27, 1792; also return of survey on the 16th day of April, 1794, to the land office, showing a survey made pursuant to said warrant on the 21st day of November, 1792, as shown by a draft embodied in said return, a copy of which return and draft is made a part of this bill of exceptions for the purpose of incorporating herein what is thereby shown, and the said copy is hereto annexed and marked Exhibit "A."

The plaintiff then gave in evidence a patent from the Commonwealth of Pennsylvania to Samuel Wallis, bearing date February 24, 1795, for the land so surveyed according to the description in the return of survey in the warrant name of George Moore, a copy

worth in real estate, above all his debts and liabilities, at least thirty thousand dollars.

57 JOSEPH POWELL.

Sworn and subscribed to this 9th day of June, 1885.

[SEAL.] JNO. W. MIX,
U. S. Commissioner in & for West. Dist. of Pa.

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59 *locus in quo* (*prout narr*) by producing in evidence warrant of survey from the Commonwealth of Pennsylvania to survey for one George Moore a tract of land of four hundred acres, adjoining or near lands granted on the day of the date of said warrant to Samuel Temple, in the county of Northumberland, the said warrant bearing date April 27, 1792; also return of survey on the 16th day of April, 1794, to the land office, showing a survey made pursuant to said warrant on the 21st day of November, 1792, as shown by a draft embodied in said return, a copy of which return and draft is made a part of this bill of exceptions for the purpose of incorporating herein what is thereby shown, and the said copy is hereto annexed and marked Exhibit "A."

The plaintiff then gave in evidence a patent from the Commonwealth of Pennsylvania to Samuel Wallis, bearing date February 24, 1795, for the land so surveyed according to the description in the return of survey in the warrant name of George Moore, a copy

of which is hereto annexed and marked Exhibit B, and then proceeded to deduce title by mesne conveyances from the said Samuel Wallis to the plaintiff, who derived his title immediately from one William H. Winder by deed dated December 17, 1864.

60

The evidence showed that up to the date of the alleged trespasses the *locus in quo* and lands surrounding consisted of woodland, forest, or unseated land.

Plaintiff gave evidence tending to show payment of taxes on the said lands in the warrantee name of George Moore from 1812 to 1877; and gave in evidence certain official documents from the land office of Pennsylvania, as follows:

Copy of return of survey of the Robert Erwin warrant, a copy of which is hereto annexed and marked Exhibit C.

Copy of the return of the Samuel Cooley warrant, a copy of which is hereto annexed and marked Exhibit D.

Connected draft of returns of survey of George Moore and Robert Erwin warrants, a copy of which is hereto attached and marked Exhibit E.

Connected draft of seventy-three tracts of land including the George Moore, a copy of which is hereto annexed and marked Exhibit F.

61

Copy of return of survey of the Henry Betz warrant, a copy of which is hereto annexed and marked Exhibit G.

Connected draft of returns of survey of the Robert Erwin and Andrew Tybout warrants, a copy of which is hereto annexed and marked Exhibit H, and in connection therewith called certain surveyors and gave testimony by them, the plaintiff's evidence on this subject tending to show the location of the George Moore warrant upon the ground, and tending to show that, according to such location, the defendant had committed the trespass alleged.

By the said testimony of surveyors called by the plaintiff, and by the maps and evidences of title put in evidence by the plaintiff, certain facts appeared, which are more fully referred to — connection with certain evidence given and offers of evidence made by the defendant, as hereinafter stated.

Plaintiff proved the incorporation of the defendant company under the laws of Pennsylvania, the date of the beginning of its corporate existence being February 6, 1868, and also gave evidence tending to show said corporation was formed by persons who composed a voluntary association, known as the Schrader Land Company, to whose property, contracts, debts, and liabilities, the said corporation defendant by its agreement succeeded.

62

The evidence further tended to show that the Schrader Land Company, by its trustees, had duly sold and conveyed to the Towando Tanning Company, a corporation organized under the laws of the State of Pennsylvania, all the hemlock bark on the lands of the said Schrader Land Company, known as the Schrader lands and comprising several thousand acres of forest lands.

That by color of said *consequence* the said Towanda Tanning Company, in the summer of 1867, entered the *locus in quo* under and by authority of the Schrader Land Company, and cut and felled a

large number of hemlock timber trees, and stripped the bark therefrom, and took and carried away the said bark, through the agency of one David M. McCraney, its agent and contractor employed for that purpose, and that in the fall and winter of 1867–'8, the said McCraney, under a contract with the Schrader Land Company,
63 for that purpose, cut up into saw-logs the hemlock trunks, so as aforesaid felled, and peeled and banked the same on the Schrader creek preparatory to running the same down the said creek to the mill of the Schrader Land Company.

That after the organization of the defendant company it proceeded to carry out the contract of the Schrader Land Company with McCraney, and said McCraney ran and floated the said logs down the said creek to said mill, then the property of defendant company.

That afterwards, in the summer of 1868, other hemlock trees were cut and felled by McCraney in the *locus in quo* for the Towanda Tanning Company, under color of its purchase of the bark from the Schrader Land Company as aforesaid, and by authority of the defendant, and the said McCraney, as agent and contractor, stripped the bark from said trees and carried it away, and afterwards under his said contract with the Schrader Land Company, adopted and continued by the defendant company, he cut the said trees into saw-logs and caused the same to be floated to the mill of the defendant company.

64 That in carrying on the said operations the said McCraney sublet to sundry jobbers the felling, peeling, and putting on the banks of said Schrader creek the said hemlock timber, and that said jobbers had their respective jobs marked out by lines upon the ground upon the *locus in quo*, and that some of them built shanties or houses thereon for their shelter and accommodation while engaged in work upon the *locus in quo*.

That in the cutting and removing of the said hemlock timber and bark, divers hardwood trees of maple, beech, &c., were cut and felled and either cut into saw-logs and removed to the mill of defendant company or destroyed.

Evidence was given tending to show that subsequent to November 2, 1869, a large quantity of logs, to wit, upwards of one hundred thousand feet was removed by McCraney under his said contract, carried on by him and the Schrader Mining and Manufacturing Company, which timber was cut down and felled previous to said Nov. 2, 1869, and was at that date lying upon the ground in the *locus in quo*.

65 Evidence was also given by the plaintiff tending to show the quantity and value of the timber taken as aforesaid.

The plaintiff's evidence also showed that all of the said alleged trespasses were committed within certain boundaries marked upon the ground by a line of trees blazed and having the blazed marks painted white, which line was known as the painted line, and was claimed up to by the Schrader Land Company, the Towanda Tanning Company, under its purchase of the bark, and by the defendant company.

The defendant company gave in evidence a warrant of survey

from the Commonwealth of Pennsylvania to survey a tract of land of four hundred acres for Andrew Tybout, northeasterly and adjoining land granted to Robert Irwin, in the county of Northumberland or Luzerne, pursuant to which warrant a survey was made March 24, 1794, and subsequently returned.

The said return contained a draft of the survey which was a part thereof, and a copy of the said draft and return are made a part of these exceptions for the purpose of incorporating herein what is thereby shown, and said copy is hereto annnexed and marked
66 Exhibit I.

Defendants then gave in evidence a patent from the Commonwealth of Pennsylvania to one Daniel Broadhead for the lands described in the said return of survey, a copy of which patent is hereto annexed and marked Exhibit J and made a part of this bill of exceptions.

Defendant then deduced title to the said tract of land by sundry mesne conveyances from and under said patent, showing the said tract to have been a part of a body of land comprising about seventeen thousand acres, the title to which was for a long time, to wit, from 1795 to 1855, vested in Robert Barclay and his devisee, Charles Barclay, under whom defendant claimed, and that said lands were known as the Barclay lands, and subsequently a large portion of them, including the Tybout tract, as the Schraeder lands.

The Schraeder Land Company derived its title by deed dated Jan'y 3, 1866, and the Schrader Mining and Manufacturing Company derived title by deed from the trustees of the Schrader Land Company dated March 2, 1868.

67 Defendant also gave evidence of payment of taxes on Tybout tract from 1812 to a date subsequent to the bringing of this suit.

By the undisputed evidence it appeared that the hemlock northeast-corner tree called for in the George Moore return of survey was identical with the hemlock northeast-corner tree called for by the Andrew Tybout return of survey, and that the said surveys overlapped or interfered so far as their boundaries would include the same territory by running the said boundaries from the said hemlock as a common northeast corner, according to their returns the amount of said interference being about three hundred and twenty-five acres.

By like evidence it also appeared that the said hemlock was the northwest corner called for in the Henry Betz return of survey, and that the Henry Betz survey adjoined with the George Moore and Andrew Tybout surveys on the east, separated therefrom by an old line marked as early as 1784, and re-marked in 1792, and subsequent years, and extending several miles southerly.

Evidence was given by defendant showing that original marks were found on certain trees on the north, east, and south
68 lines of the Tybout survey, which counted to the date of that survey, and that the hemlock northeast corner, the sugar southeast corner, and the hemlock sapling southwest corner called for in the return were marked respectively as corners in 1794.

The hemlock sapling had disappeared, but the age of the corner was determined by the defendant's surveyor by a witness found thereat and other signs.

The defendant alleged that the plaintiff's tract was never actually surveyed upon the ground north of the line from the hemlock sapling to the sugar corners corresponding to the south line of the Tybout survey, and in support of its allegation relied upon the following evidence which appeared in the cause:

As a part of his claim of title the plaintiff put in evidence a deed tripartite dated October 25, 1805, between Joseph Priestly and wife, of the first part, John Vaughan, of the second part, and Thomas Fitzsimmons, John Miller, Jr., and Robert Bird, trustees for certain creditors of John Vaughan, of the third part, which recited that—

69 "For as much as divers inaccuracies have been discovered in the original surveys made of several of the tracts which in the division aforesaid fell to the lot of them, the said Thomas Fitzsimmons, John Miller, Jr., and Robert Bird, trustees aforesaid, the same have therefore since been resurveyed and are now more accurately designated in the annexed draft thereof, representing each tract as it is actually surveyed and marked upon the ground (mentioning subsequently, *inter alia*, the George Moore warrant, and giving also its fancy name of Greenfield); all which tracts are distinguished and marked on the annexed plan by numbers corresponding with those above enumerated, and are represented and described by the annexed plan of there survey thereof as actually resurveyed and marked on the ground as aforesaid," and to which was attached a certain map referred to therein, which map was also given in evidence by the plaintiff.

A full copy of the said tripartite deed is hereto annexed and marked Exhibit K.

70 The width of the George Moore warrant, as shown by this map, was 200 rods, which corresponds with the distance laid down in the return of survey, but the calls in the return for General Broadhead's lands gives the Moore survey an additional width of about thirty rods.

The said map showed the George Moore lot in the same position as in the survey thereof with regard to the surrounding lots of Henry Betz, Joseph Betz, and Samuel Cooley.

It was also shown by the plaintiffs' surveyors, or one of them, that beginning on the north line of the Moore survey, as located on the ground by its return, at a point two hundred rods westerly from the hemlock, northeast corner, a line extended from a corner marked in 1798 nearly parallel with the east line of the Moore tract, and also nearly parallel with such east line projected southerly, which was run in 1798, for about three miles and sixty-four rods, where it ended, and an offset was thence made to the west to an undisputed line of 1792, bounding the Broadhead or Barclay lands on the east, the plaintiff's surveyor testifying that the said line of 1798

71 was evidently a trial line. Said Broadhead line ran about thirty rods distant from and nearly parallel with said line of

1798, and extended from the hemlock sapling corner before mentioned, a distance of five or six miles southerly.

Plaintiff's evidence also showed a general survey of 1798 to have been marked on a number of the tracts mentioned in said deed of 1805.

The map attached to said deed in laying down the George Moore survey thereon and other surveys south of the same, laid them down as 200 perches in width, being the width called for in the official surveys and being about thirty perches less in width than the actual distance to the old line of the Broadhead lands called for in said surveys, and it was claimed by the defendant that the map thus showed the George Moore warrant was bounded on said map by the line of 1798 aforesaid. No other general survey of the lands mentioned in said deed of 1805 was made between the dates of the warrants and the date of the deed of 1805.

It was shown by one of plaintiff's surveyors that in 1860
72 he made a survey of the Barclay lands for the owners, he having then in his possession the field notes of his grandfather, one Major Zephon Flowers, whose work has been found, dating as early as 1795, and who surveyed and mapped the Barclay lands for their owners in 1828.

That on said survey of 1860 the said surveyor, one Z. F. Walker, found the corner of 1798 at the north end of the line of 1798 and also followed the said line of 1798 either then or in 1866 to its end.

That in 1860 he searched northerly from the hemlock sapling corner for a line of 1792, but found none.

That he surveyed the said lands in 1866 for their owners and afterwards in 1880 for the plaintiff, but on neither survey did he find any marks of 1792 north from the hemlock sapling corner (no timber being left north of Schrader creek on this line after 1867 or 1868) nor west from the hemlock northeast corner corresponding to the return of survey of the Moore.

It also appeared by plaintiff's surveyors that no original marks were ever found on the line corresponding with the south line of the Moore as returned nor were original corners ever found
73 at either end of said south line.

Defendants put in evidence certain official connected maps or drafts from the land office of Pennsylvania, one bearing date 1799, called the Broadhead map, a photographic copy of which is attached hereto and made a part hereof and marked Exhibit L; also a certified connected map from the department of internal affairs of Pennsylvania of the George Moore and other warrants, a copy of which is hereto attached and made a part hereof and marked Exhibit M; also a certified connected map from the said department of the Henry Epple, Catharine Eck, junior, and other warrants, a copy of which is hereto attached and made a part hereof and marked Exhibit N; also a diagram prepared by the defendant's counsel and proven to be accurate, showing the connection and relation of the three last-mentioned maps, a copy of which is hereto annexed and made a part hereof and marked Exhibit O.

Defendant, by its surveyors, also gave evidence tending to show

that a line bearing marks dating 1792 was found from the
74 sugar-tree, the southeast corner of the Tybout tract, to the hemlock sapling corner mentioned, and that the sugar-tree was marked as a corner of 1792, and that a corner of 1792 was found at the hemlock sapling corner. The plaintiff's evidence showed the George Moore was bounded on the west from the hemlock sapling corner, south by a tract in the warrantee name of Robert Irvin, surveyed Nov. 22, 1792, which was a part of the Broadhead lands; also that the hemlock northeast corner of the Moore was the northwest corner of a tract surveyed in the warrant name of Henry Betz on the 4th day of July, 1793, which tract adjoined the Moore on the east for about two-thirds the length of its east line and that the said Moore was adjoined for the remainder of the distance on its east line by a tract surveyed in the warrant name of Joseph Betz on the 4th day of July, 1793. The returns of survey of these two Betz tracts were made April 16th, 1794, with the Moore, Cooley, and Irvin; also that the tier of warrants east of Betz tier of warrants was surveyed on the 19th and 20th of November, 1792, as will appear by a
75 plat of connected surveys made by plaintiff's surveyors and given in evidence, a copy of which is hereto annexed and marked Exhibit P.

It was testified by one of plaintiff's witnesses, one of the surveyors, that he had found no original line dividing the Moore and Cooley, the Cooley and Hardy, and the Hardy and Seeley, which was as far south as he had examined in this tier of warrants; that southerly from the southeast corner of the Henry Betz and the southwest corner of the Samuel Temple he had found an old line run in 1798, but no original line bearing the date of survey of the tracts abutting upon it as far south as he had examined, some three miles, nor had he found any original corners for that distance southerly on that line; that he had found no cross-lines, running in an eastwardly and westwardly direction, dividing the two tiers of warrants lying east of the Moore, Cooley, and Hardy, and that the said two tiers were located by lines of corners; that, so far as he had searched, he had never found any cross-lines running eastwardly and westwardly of the block including the Moore and Cooley and of the block
76 including the Betz and Temple warrants; but the common corners of the Cooley and Hardy lots and the Hardy and Seeley lots in the old line of 1784 were identified by one or more of the witnesses, surveyors, and a line run and marked in 1792, forming the eastern boundary of the second tier of lots east of the George Moore, namely, Samuel Temple, Henry Bryson, Joseph Seeley, Henry Seeley, and Samuel Hardy (as shown in Exhibit P), was followed and identified by a surveyor employed by both parties in 1875, and who was a witness, and testified thereto, and who found the corners of all of said last-mentioned lots in said line.

There was evidence tending to show that no difference could be detected in the count of a line marked November 21, 1792, and one marked July 4, 1793.

The defendant gave in evidence certain field-notes of Major Flowers of surveys made for the owners of the Barclay lands in 1828, show-

ing examinations made by him of the north line of the Andrew Tybout tract; also on the south line of said tract to the hemlock sapling corner, showing that he found the line of 1798, before mentioned, running south from the north line of the Andrew Tybout tract, but containing no entry that he found at the time of
77 his examination of said lines any marks of 1792 on the north line of the Moore or on the west line north from the hemlock sapling corner.

It appeared by the evidence of the plaintiff's surveyor, Walker, that he found the letters B A R for Barclay, with the numbers of the Barclay warrants, marked by Major Flowers at the hemlock northeast corner of the Moore and Tybout warrants, at the sugar southeast corner, and at the hemlock sapling corner.

In connection with this evidence the defendant offered to give further evidence, founded on examinations made upon the ground by surveyors in connection with the maps and other documents already in evidence, to show that the Moore warrant was not actually surveyed on the ground according to its return of survey, but that it was surveyed, together with the Cooley and other warrants to the south of it, in one block, of which the Moore was the northern member; that the north line of said block, as actually surveyed upon the ground in 1792, was run between the hemlock sapling and sugar corners, corresponding to what was claimed by the de-
78 fendant to be the south line of the Andrew Tybout tract; that no line of 1792 was surveyed on the ground for the Moore warrant north from the hemlock sapling corner, nor west from the hemlock northeast corner of the Tybout tract; that the line south from the hemlock northeast corner aforesaid was run for warrants to the east of said line, and was adopted merely by the return of the Moore.

To this evidence the plaintiff objected on the ground that twenty-one years and upwards having elapsed from the date of the Moore survey there was a presumption *juris et de jure* that the said survey was made as returned, and the evidence was, therefore, inadmissable.

The court sustained this objection and excluded the evidence so offered, and thereupon the defendant did then and there except to the said ruling and to the exclusion of said evidence, and at its request this bill of exceptions was then and there noted and is now signed.

The defendants also contended on the trial of the case that the plaintiff could not recover by reason of certain alleged acts and declarations of Elisha A. Packer, the plaintiff, and by reason
79 of certain acts and declarations of Jacob Dewitt, alleged to have been made and done by him as the duly authorized agent of Elisha A. Packer.

The evidence of the defendant on this subject tended to show the following facts:

That soon after the purchase by the plaintiff of certain lands which adjoined the Schrader lands on the east for two or three miles or more and included the *locus in quo* he employed Jacob De-

witt as his agent or attorney with reference to his said lands; that as such agent said Dewitt had full power and control of the lands and to protect them from depredations and from any trespasses being committed upon them. Mr. Packer had never seen the lands, and resided in the city of New York, upwards of two hundred miles distant therefrom.

Dewitt also attended to the payment of taxes on the lands and conducted some negotiations for Packer with reference to a proposed sale of them. Packer had no other agent as to the lands. While De Witt's authority was such the Schrader Land Company, in 1866, contemplated the erection of a saw-mill and extensive lumbering operations. Its affairs were managed by an executive com-
80 mittee composed of Chas. F. Wells, Jno. F. Means, and V. E. Piollet. They determined to establish and paint a boundary line of the Schraeder lands as a guard against trespassing upon adjoining owners, and so informed Jacob Dewitt, as agent for Packer. Dewitt was at this time an attorney-at-law, a stockholder in the Schraeder Land Company, and was occasionally consulted professionally by that company, drew contracts for it, &c.

It was considered by said committee, and Dewitt, representing Packer, assented, that Z. F. Walker would be a suitable person to run and establish the boundary line between the Schraeder lands and the Packer lands, and he was accordingly selected for that purpose.

He was not informed of any concert of action between Dewitt, as the agent for Packer, on the one hand, and the Schraeder Land Company on the other. He was employed by the executive committee of the Schraeder Land Company, and he was paid by that company. His instructions were to establish and paint the boundary line of the Schrader lands. He had in his possession at this
81 time a copy of the map of 1799, called the Broadhead map, a map made by Major Flowers of his re-survey of 1828, and the field-notes of Major Flowers made in 1828, before referred to; also in his possession or access to a copy of a map of the Vaughan or Priestley lands, including the George Moore, and showing the warrant number of the Moore according to the map attached to the deed of 1805.

In making his surveys in 1860 of the Schrader lands Walker had delineated the George Moore interference on a map made by him and given to the Schrader Land Company, showing the interference as claimed by the plaintiff, except as to the western boundary line, which was laid down on the map as corresponding to the line of 1798, mentioned heretofore in these exceptions. No maps or documents were furnished Walker by either the Schrader Land Company or Jacob Dewitt to aid him in establishing the boundary.

After the line was painted Jacob Dewitt and the executive committee went by rail some sixteen miles from Towanda to the foot of the plane, the railway station nearest the Schrader lands, and
82 from thence Dewitt and two or three of the committee went up the Schrader creek to examine the painted line. They met Walker at the foot of the plane, who informed them that he had

found some marks of an interference of survey on the Tybout tract, but that he had put the line where he believed it ought to be, and where it always had been. Dewitt and the members of the committee then went on the painted line, which was on the north, east, and south boundaries of the Andrew Tybout tract, and examined some some portion thereof. Here Dewitt stated to the members of the committee who were with him that he was satisfied the interest he represented would be protected by the painted line; that he would thereby come into possession of the strip some thirty rods wide, running some two or three miles adjoining the Schrader lands (referring thereby, as the defendant claimed, to the lands between the 1798 line, before mentioned herein, and the Broadhead line). He also stated to the committee that they might go on and build their mill and cut up to the painted line.

This happened about the first of August, 1866. In the following fall two members of the said executive committee went to
83 New York to see Mr. Packer and assure themselves of Mr. Dewitt's authority for establishing the painted line. They did see Mr. Packer, and informed him of what had been done in reference to running the line and fixing the line between the Packer lands and the Schreader lands; that Mr. Dewitt, in association with a committee of the Schraeder Land Company, had caused to be run and painted a line the whole length between the two parties, Mr. Dewitt acting for Mr. Packer. To this Mr. Packer replied [that] he had never been on the lands; that Mr. Dewitt was his attorney, and that what Mr. Dewitt did he consented to.

Subsequently, about 1869, Dewitt stated to one of the directors of the Schrader Mining and Manufacturing Company that he had been informed that company had trespassed upon Packer's lands. Dewitt and the said director went upon the lands and followed the painted line, and finding no cutting had been done beyond it, expressed himself as satisfied.

On the subject of damages to be recovered by the plaintiff, a question arose as to the time to which the plaintiff was entitled to damages, which question arose as follows:

84 The defendant gave in evidence a deed from plaintiff to Jacob Dewitt, dated November 2, 1869, duly executed and acknowledged on the same day, purporting to convey absolutely and without condition certain lands, including the *locus in quo*, to the said Dewitt in fee, a copy of which deed is hereto annexed and marked Exhibit Q.

In rebuttal of this the plaintiff gave in evidence a certain article of agreement between himself and Jacob Dewitt, a copy of which is hereto annexed and marked Exhibit "R."

In connection with this paper the plaintiff testified that the said Dewitt did not comply with the conditions therein expressed, but that subsequently, to wit, about October 1, 1870, the said conditions were complied with and the plaintiff then sold him the land. And thereupon the court proceeded to charge the jury as follows:

"GENTLEMEN OF THE JURY: This is an action of trespass brought

by Elisha A. Packer against the Schrader Mining and Manufacturing Company for trespassing upon his land and cutting and carrying away the timber thereon. The defendant has pleaded two defenses: first, not guilty, which amounts to a denial that it
85 committed any trespass; and, second, *liberum tenementum*, or title to the land in itself. These two issues are presented by the pleadings. If they should be found against the defendant, then a third inquiry will be as to the amount of damage committed by the defendant against the plaintiff by cutting and carrying away his timber.

We will first take up the question of title. The defendant pleaded *liberum tenementum*, which means that the title of the land where the alleged trespass was committed was in the defendant itself; in other words, that it was its own land. The plaintiff denies this plea. Hence the title to the land is in dispute between them.

The plaintiff deduces title under a warrant and survey to one George Moore, the warrant being dated April 27, 1792, and the survey being made November 21, 1792. The defendant deduces title under a warrant and survey to one Andrew Tybout, the warrant being dated February 15, 1794, and the survey being made March 24, 1794. The plaintiff's survey being the oldest, if it is valid and if it embraces the property in dispute, it gives the superior
86 title, and the issue of title must be found in his favor.

It is conceded by the defendants that the George Moore survey located according to its calls, as made in the official survey returned to the land office by the deputy surveyor, does embrace the land in dispute, or, if not so conceded, the evidence is so clear on that subject and so free from doubt that we should feel it our duty to direct you that such is the fact, if you believe the witnesses.

On the north and the northern portion of the west side the survey calls for vacant land. On the east, south, and remaining portion of the west side it calls for adjoining lots which were surveyed about the same time, and whose location seemed to be fixed beyond dispute. On the east side it calls for the Henry Betz lot and a portion of the Joseph Betz lot, beginning at a hemlock at the northwest corner of the Henry Betz, being the northeast corner of the George Moore.

The location of these Betz lots is fixed on the ground by all the surveyors. The hemlock tree is identified, and the line between the George Moore and the Betz lots is also identified by marks
87 corresponding in date with the surveys and by still older marks showing that it was established before these surveys were made, and extended several miles in a southerly direction. On the west side the George Moore survey calls for vacant land, as before mentioned, for about two-thirds of the distance on the northern portion of the line, and for General Broadhead's lands for the remainder or southern portion.

It is conceded that the easterly line of the General Broadhead lands is an old established line extending for several miles in a southerly direction from the point where it is shown to commence on the west side of the George Moore tract, and it is identified by the surveyors

by marks bearing date at the time of the survey (1792). This line is parallel, or nearly so, with the old line on the east of the George Moore tract, and distant about 230 rods therefrom, and between these two long parallel line- is located a series of surveys, which tend to fix the location of the George Moore survey beyond all dispute. On the south of the George Moore is the Samuel Cooley survey, whose location is determined by the surveyors without contradiction, and on the west of the George Moore, on the Broadhead lands,
88 is the Robert Erwin survey, whose location is also determined with the same degree of certainty. The north line of the Robert Erwin lot is an oblique line running northwesterly from the George Moore's west line, beginning at a hemlock sapling. This oblique north line of the Erwin lot is shown on the George Moore survey, and the hemlock sapling is called for in the Erwin survey of date only one day later than the George Moore, and its position was identified by the surveyors, so that we have the George Moore survey fixed in position by adjoining surveys on three of its sides by old lines, well recognized, and by monuments which are undisputed, and, as thus located, it embraces the disputed lands.

But the defendants offered evidence to show that, as actually located on the ground by the deputy surveyor, the George Moore was south of the disputed lands contrary to its location as exhibited by the official survey, and that the latter location (according to the official survey) was a mere chamber location, having never been made in fact.

This evidence was rejected by the court.

We think that an old survey like that of the George Moore cannot be questioned at this late day by any parties claiming
89 under a junior title, whether that title took its origin within twenty or twenty-one years of the older survey or after that time.

The supreme court of this State so decided in this very case, and we think that the decision was right, notwithstanding some earlier opinions which seem to hold a different doctrine.

Our instruction, therefore, to you is that if you believe that the surveyors who have testified in this case have correctly identified the hemlock called for in the official surveys at the northeast corner of the George Moore and the northwest corner of the Henry Betz, and the old line of 1792 running southerly from said hemlock, and the easterly line of the lands known as the General Broadhead lands, including the position of the hemlock sapling at the north end of said line, and the location of the Henry Betz, Joseph Betz, Samuel Cooley, and Robert Erwin official surveys, then, since these monuments fix the location of the George Moore survey so as to embrace the lands in dispute, you must find for the plaintiff on the issue of title; that is, you must find the issue on the plea of *liberum*
90 *tenementum* against the defendant and in favor of the plaintiff; and the court regards the evidence on this point so clear that the jury can have but little hesitation or doubt on the subject.

The contention of the defendant that its title to the land in dispute became established and valid as between itself and the plaintiff by

the consent and acquiescence given by Jacob Dewitt, the plaintiff's agent, to the painted line made by Mr. Walker in 1866 cannot be admitted.

The assent given to that line by Jacob Dewitt was not given to it as a compromise line yielded to for the purpose of ending a dispute or difference between the parties, for there was no such dispute or difference. They had no knowledge that the George Moore survey belonging to the plaintiff interfered with the Andrew Tybout survey of the defendant's predecessors and grantors.

The intimation thrown out by Mr. Walker, in presence of Jacob Dewitt (if such was the fact), that there was some interference on the Tybout tract was not sufficient notice of the interference that actually existed, especially as Mr. Walker immediately added that he had put the line where he thought it ought to be and where it always
91 had been. No question of title had arisen between the parties, and this observation of Walker's, if made at all, was not such as to awaken Dewitt's mind to the character of the conflict that actually existed between the titles.

The object the parties had in view was not to settle a difference, but to run what was supposed to be an unquestioned line between them, and it was the act of the Schrader company; they wanted the line run; they chose Walker to run it, as he was familiar with their lands, and had surveyed them and possessed his grandfather'-, Major Flowers, maps and field notes made in surveying the same lands when they belonged to Barclay. He was not selected because of any knowledge he had of the plaintiff's lands or the plaintiff's title papers, for he knew nothing of these but what he learned from an unofficial map that he got hold of.

Walker was employed by the Schrader company, paid by them, and did the work for them and for their purposes; DeWitt merely consented, and, supposing that Walker knew where the true lines were, he assented to the line run. He assented to it on the sup-
92 position that there was no conflict between the titles.

But it turned out that the line run by Walker was an erroneous one. It was based on a palpable mistake and error—a mistake of which the parties were unaware at the time. It took in with the Schrader lands over 320 acres of the George Moore survey belonging to the plaintiff, that being the extent of the interference of the Andrew Tybout survey with the George Moore. It cannot be conceived for a moment that if the plaintiff or his agent had known of this interference (his being the superior title) he or his agent would ever have consented to the line that was run. If, with full knowledge of his rights, he had consented to it it would have presented a different question, but there is no evidence that he or his agent or those acting for the Schrader company had any knowledge or notice of it whatever; it was a clear mutual mistake, one that ought not conclude or bind the plaintiff to the loss of his land.

There is a great difference in the situation and responsibility of parties when, on the one hand, they merely have a boundary
93 line run and a-certained between non-conflicting titles and surveys, and when, on the other, they mutually undertake

to settle and adjust a disputed boundary line between conflicting titles.

In the latter case they are at arm's length and on their guard, and look carefully at their muniments of titles, and when they concede anything it is done with their eyes open and a knowledge of the consequences.

The present case, according to our view of the evidence, is not of the latter kind.

It belongs to the first type of cases, that in which the parties attempt merely to a-certain and mark a boundary line supposed to be determinable between undisputed tracts of land, but acting in total ignorance and mistake as to the location of one of the individual surveys.

It is found that the true line was not run at all, but that a large tract of the plaintiff's land was by pure mistake embraced with the lands of the defendant.

It is a question of error and mistake; it is not a question of consentable or compromise lines at all. In our opinion there is not sufficient evidence in the case to be submitted to the jury for
94 them to deliberate on the question whether the painted line was a compromise line knowingly adopted by the parties so as to bind them in reference to the now-acknowledged interference of their surveys.

It would be altogether too dangerous to allow men's titles to be thus put upon such a hazard without clear proof that they had a knowledge of their rights and acted understandingly.

It follows, therefore, that the evidence relating to the painted line, and to the assent given to it by the plaintiff's agent, can have no influence on the question of title under the plea of *liberum tenementum.*

The only bearing it can have in the case (if it has any) is on the question whether the defendant in taking and carrying away the timber was or was not guilty of a trespass, or, if guilty, whether it is liable to the full amount of damages which might be incurred under different circumstances.

In other words, supposing your verdict to be in favor of the plaintiff on the plea of title, the question is whether, even though
95 the land and the timber on it belonged to the plaintiff, the defendant was guilty of a trespass in taking and carrying away the timber, and, if so, to what extent of damages.

A person may be responsible for the value of another's property which he has converted to his own use without being guilty of trespass in taking it. If he has lawfully acquired possession of it and then used it or disposed of it, though not guilty of a trespass, he is still liable to the owner for its value.

But the damages are often different when a trespass has been committed and when it has not. Hence, if one is sued for a trespass it must be proved that he has committed a trespass.

The present suit is an action for trespass. Therefore the plaintiff must prove that the defendant was guilty of a trespass.

It is not a trespass if one goes upon your land with your license

and permission. If with such license and permission he cuts and carries away grass or timber it is not a trespass, and you cannot recover any damages against him, for every man has a right to give away his property if he chooses to do so. Such cases are very simple, because you are supposed to know your own rights and
96 what you are doing when you give the license.

You know your title and you give the license freely and voluntarily..

But in our view this case in which a boundary line has been adopted by mistake has nothing of license in it.

There was no intention to give a license. The transaction has not a single element of license; it was simply a mutual mistake in the location of the line which was supposed to separate the respective lands of the parties.

Where lands are improved on both sides of a division fence which is not on the true boundary line, the parties are respectively in possession up to the fence, and such possession for twenty-one years will ripen into title and neither party will be guilty of trespass. But where a boundary line is designated through unseated lands or wild woods by marked trees or other like indicia, as in this case, and each party cuts wood or timber on his side of that line, such cutting does not amount to possession; it does not exempt the party from liability for the value of the timber cut if the line is
97 erroneous, and if he really cuts the timber on his neighbor's land, and it does not prevent the other party from claiming title up to the true line, nor from bringing an action of ejectment or an action of trespass for cutting and carrying away the timber. If the designated line is erroneous, and if the timber cut and carried away is really on his land, the designated line, though supposed by both parties to have been the correct line between them, will not deprive him of his right of action against the other party who cuts and carries away the timber.

Though supposed to be the true line, it was a mistake and an error, and neither party intended to give to the other license to cut and carry away timber on his own land. Having been a mutual mistake, it does not effect the title or right of the respective parties; and as the lands are wild, unseated lands, the title draws to it the posssession, and the party who cuts the timber on the other's land invades the latter's possession and is in law a trespasser.

The circumstances of the case, it is true—that is to say, the
98 fact that there was a mutual error and mistake—may go in mitigation of the damages, which should be restricted to the mere value of the timber before it was cut or carried away without any statutory penalty, and without any damages of a punitive or vindictive character.

"We charge you, therefore, that if the painted line was assented to by the plaintiff's agent in ignorance of the true boundaries of the plaintiff's land, and in ignorance of the interference between the George Moore and Andrew Tybout surveys, then the defendant was not protected by that line from an action of trespass in taking and carrying away the timber from the plaintiff's land; and as there is

no sufficient evidence to show that the plaintiff or his agent knew the true boundaries and knew of the interference between the said surveys at the time of the cutting, you are to presume, under the circumstances of the case, that they were ignorant of the same."

The residue of the charge related to the question of dam-
99 ages recoverable by the plaintiff.

Whereupon the defendant did then and there except to the portions of the charge of the court hereinafter set forth, and, at the request of the defendant, the court did then and there severally note a bill of exceptions upon each of the said portions of the charge so excepted to and now signs the same.

The defendant did also, in due time and proper order, submit certain points in writing, and request the court to charge the jury as therein stated; but the court did then and there refuse to charge the jury upon the said points as so requested, and the same were all declined, except as covered by the general charge embraced in this bill of exceptions.

Whereupon the defendant did then and there except to the said refusal of the court to charge as so requested, and the court did then and there, at the request of the defendant, note a bill of exceptions upon each of the said points severally and now signs the same.

100 The said portions of the charge and the said points so excepted to are as follows:

As to the plaintiff's title under the George Moore warrant the court charged the jury:

"We think that an old survey like that of the Moore cannot be questioned at this late day by any parties claiming under a junior title, whether that title took its origin within twenty or twenty-one years of the older survey or after that time.

"The supreme court of this State so decided in this very case, and we think that the decision was right, notwithstanding some earlier opinions which seem to hold a different doctrine."

Upon this subject the defendant submitted the following points:

1. That if the jury believe the George Moore warrant, together with the Cooley and others to the south of it, were surveyed in one block, of which the Moore was the northern member; that the north line of said block, as actually surveyed upon the ground in 1792, was run between the hemlock sapling and sugar corner
101 corresponding to what is claimed by the defendant to be the south line of the Andrew Tybout tract, the plaintiff has no title to the part of the land north of the said south line of the Tybout tract and cannot recover, provided the jury believe the Tybout tract was actually surveyed and located upon the ground, as claimed by the defendant.

2. That if the jury believe that no line of 1792 was surveyed upon the ground for the Moore warrant north from the hemlock sapling corner and west from the hemlock, claimed by the defendant to be the northeast corner of the Tybout tract, and that the line from the hemlock, northeast corner aforesaid, south to the sugar corner, was run for warrants east of said line, and that said line was adopted by the return of survey of the Moore, such adoption will not avail to

extend the Moore north of the line between the hemlock sapling and the sugar, provided the jury believe the last-mentioned line was the northern limit of the Moore block of surveys and the Tybout was surveyed and located as claimed by the defendant.

102 3. That, as the evidence shows, the Tybout tract was surveyed March 24, 1794, within two years of the date of survey of the Moore, and as the Tybout survey was duly returned, patent issued, and claim of title asserted thereunder up to the present time, and as twenty-one years did not elapse between the Moore and the Tybout surveys, the presumption that the Moore was actually surveyed as returned is not conclusive, but may be rebutted by evidence.

Upon the subject of the alleged agreement as to the painted line the court charged the jury—

"1. The contention of the defendant that its title to the land in dispute became established and valid as between itself and the plaintiff by the consent and acquiescense given by Jacob Dewitt, the plaintiff's agent, to the painted line made by Mr. Walker in 1866 cannot be admitted.

"The assent given to that line by Jacob Dewitt was not given to it as a compromise line yielded to for the purpose of ending a

103 dispute or difference between the parties, for there was no such dispute or difference. They had no knowledge that the George Moore survey belonging to the plaintiff interfered with the Andrew Tybout survey of the defendant's predecessors and grantors.

"The intimation thrown out by Mr. Walker, in presence of Jacob Dewitt (if such was the fact), that there was some interfence on the Tybout tract was not sufficient notice of the interference that actually existed, especially as Mr. Walker immediately added that he had put the line where he thought it ought to be and where it always had been.

"No question of title had arisen between the parties, and this observation of Walker, if made at all, was not such as to awaken Dewitt's mind to the character of the conflict that actually existed between the titles.

"2. It cannot be conceived for a moment that if the plaintiff or his agent had known of this interference (his being the superior title) he or the agent would ever have consented to the line that was run.

104 "If with full knowledge of his rights he had consented to it, it would have presented a different question.

"But there is no evidence that he or his agent, or those acting for the Schrader Company, had any knowledge or notice of it whatever.

"It was a clear, mutual mistake, one that ought not to conclude or bind the plaintiff to the loss of his land.

"3. It is a question of error and mistake. It is not a question of consentable or compromise line at all.

"In our opinion there is not sufficient evidence in the case to be submitted to the jury for them to deliberate on the question whether the painted line was a compromise line knowingly adopted by the

parties so as to bind them in reference to the now acknowledged interference of the surveys.

"4. But in our view this case, in which a boundary line has been adopted by mistake, has nothing of license in it. There was no intention to give a license. The transaction has not a single element of license. It was simply a mutual mistake in the location
105 of the line which was suppose- to separate the respective lands of the parties.

"5. We charge you, therefore, that if the painted line was assented to by the plaintiff's agent in ignorance of the true boundaries of the plaintiff's land, and in ignorance of the interference between the Moore and the Tybout surveys, then the defendant was not protected by that line from the action of trespass in taking and carrying away the timber from the plaintiff's land, and as there is no sufficient evidence to show that the plaintiff or his agent knew the true boundaries, and knew of the interference between the said surveys at the time of the cutting, you are to presume under the circumstances of the case that they were ignorant of the same."

Upon this subject the defendant submitted the following points:

4. That if the jury believe that Jacob Dewitt had charge of the Packer lands, and was authorized to protect them from depredation, and had knowledge of the defendant's claim of title up to the painted line, and of the painting of such line in assertion of such
106 claim, and that said Jacob Dewitt did not object to the painting of said line, but acquies-ed therein and assented thereto, the jury would be warranted in finding the actual possession of the disputed lands to have been in the defendant when the alleged trespasses were committed, provided they believe the evidence of the defendant as to the surveys and other acts of ownership done upon the ground by the defendant, together with payment of taxes, and if they do so find the actual possession to have been in the defendant the plaintiff cannot recover.

5. That if the jury believe that Packer authorized Jacob Dewitt to establish the Tybout line as painted, or subsequently consented to such establishment, and that the same was established in good faith, the plaintiff cannot recover.

6. That if the jury believe that Jacob Dewitt had charge of Packer's lands, and was authorized to protect them from depredations, and in pursuance of such charge and authority consented to the establishment of the painted line, and the defendant in good faith relying on such consent took the timber, the plaintiff cannot recover.
107 As to the effect of the deed of November 2, 1869, the defendant submitted the following points:

7. That the conveyance from Packer to Dewitt took effect from November 2, 1869, for all the purposes of this case.

8. That there can be no recovery in this case for timber removed from the disputed territory subsequent to Nov. 2, 1869.

These points were declined by the court, and the court, on the contrary, charged the jury that the plaintiff, if entitled to recover at all, was entitled to recover damages for all cutting and carrying away of timber from the disputed premises up to the time that he

actually sold the property to Jacob Dewitt, which, according to his testimony, was the first day of October, 1870.

The foregoing bill of exceptions was presented to me as required by the order heretofore made, and is now signed by me.

(Signed) JOSEPH P. BRADLEY,
Associate Justice of the Supreme Court.

(Here follows diagram, marked p. 108.)

109 EXHIBIT B.

[Seal State of Pennsylvania.]

The Commonwealth of Pennsylvania to all [to] whom these presents shall come, Greeting:

Know ye that in consideration of the monies paid by George Moore unto the receiver general's office of this Commonwealth at the granting of the warrant hereinafter mentioned there is granted by the said Commonwealth unto Samuel Wallis, Esquire, a certain tract of land called "Greenfield," situate on the waters of Towanda creek, Luzerne county, beginning at a post; thence by land of Joseph Betz and Henry Betz north twenty-nine degrees east three hundred and eighteen perches to a hemlock; thence by vacant land north sixty-one degrees west two hundred perches to a post; thence by the same and land of Gen'l Broadhead south twenty-nine degrees west three hundred and eighteen perches to a post, and thence by land of Samuel Cobley south sixty-one degrees east two hundred perches to the beginning, containing three hundred and seventy-five acres and allowance of six p. cent. for roads, &c. (which said tract was surveyed in pursuance of a
110 warrant dated 27 April, 1792, granted to George Moore, who, by deed dated 5 July, 1794, conveyed the same to the said Samuel Wallis, Esq.,) with the appurtenances:

To have and to hold the said tract or parcel of land, with the appurtenances, unto the said Samuel Wallis, and his heirs and assigns, forever, free and clear of all restrictions and reservations as to mines, royalties, quit-rents, or otherwise, excepting and reserving only the fifth part of all gold and silver ore for the use of this Commonwealth, to be delivered at the pitt's mouth clear of all charges.

In witness whereof Thomas Mifflin, Governor of the said Commonwealth, hath hereto set his hand and caused the State seal to be hereto affixed the twenty-fourth day of Feb'y, in the year of our Lord one thousand seven hundred and ninety-five, and of the Commonwealth the nineteenth.

Attest:

[SEAL.] JAMES TRIMBLE,
Deputy Sec.

Enrolled in the rolls office for the State of Pennsylvania, pat. book No. 22, p. 450.

Witness my hand and seal of office the 12th March, 1795.

NATH. IRVIN, *N. A.*

111 Endorsed: 24 Feb'y, T., 1795. Geo. Moore, patent "Greenfield." Samuel Wallis, Esq., 375 ac's land. Luzerne county.

(Here follow diagrams, marked pp. 112, 113, 114, 115, 116, 117, & 118, which are omitted.)

119 EXHIBIT J.

Commonwealth of Pennsylvania to all to whom these presents shall come, Greeting:

Know ye that in consideration of the monies paid by Andrew Tybout unto the receiver general's office of this Commonwealth at the *quantity* of the warrant [herein]after mentioned and of the sum of five shillings and nine pence, lawful money, now paid by Daniel Broadhead, Esq., into said office there is granted by the said Commonwealth unto the said Daniel Broadhead a certain tract of land called Warren, situate on the waters of Towanda creek, in Northumberland or Luzerne county, beginning at a hemlock saplin-; thence by land of Robert Irvin north forty degrees west one hundred perches to a post; thence by land of John Banon, Jr., north twenty-nine degrees and a half east one hundred and ninety perches to a post; thence by land of William Gavet sixty-one degrees east three hundred and twenty perches to a hemlock; thence by land of
120 Drinker and Company south twenty-nine degrees and a half west two hundred [and] twenty-two perches to a sugar, and thence by old surveys north sixty-one degrees west two hundred [and] twenty-five perches to the beginning, containing four hundred and nine acres and a quarter and allowance of six per cent. for roads, &c., which said tract was surveyed in pursuance of a warrant dated 15 Feb'y, 1794, granted to the said Andrew Tybout, who, by deed dated 6 June, 1794, conveyed the same to the said Daniel Broadhead, with the appurtenances:

To have and to hold the said tract or parcel of land, with the appurtenances, unto the said Daniel Broadhead and his heirs, to the use of him, the said Daniel Broadhead, his heirs and assigns, forever, free and clear of all restrictions and reservations as to mines, royalties, quit-rents, or otherwise, excepting and reserving only the fifth part of all gold and silver ore for the use of this Commonwealth, to be delivered at the pitt's mouth clear of all charges.

In witness whereof Thomas Mifflin, Governor of the said
121 Commonwealth, hath hereunto set his hand and caused the State seal to be affixed hereunto this the twenty-seventh day of June, in the year of our Lord one thousand seven hundred and ninety-four, and of the Commonwealth the eighteenth.

(S'g'd) THOS. MIFFLIN. [SEAL.]

Attest: JAMES TRIMBLE,
Deputy Secretary.

Enrolled 28 June, 1794.

122 EXHIBIT K.

This indenture tripartite, made the twenty-fifth day of October, in the year of our Lord one thousand eight hundred and five, between Joseph Priestly, of the town and county of Northumberland, in the State of Pennsylvania, Esquire, and Elizabeth, his wife, of the first part, John Vaughan, of the city of Philadelphia, in the said State, merchant, of the second part, and Thomas Fitzsimmons and John Miller, junior, of the said city and State, merchant-, and Robert Bird, of the city and State of New York, merchant, trustees for certain creditors of the said John Vaughan, of the third part: Whereas the said Joseph Priestley held in trust for certain purposes the undivided part and share of several tracts of land in the counties of Lycoming and Luzerne, in the State of Pennsylvania; and whereas the purposes and objects of the said trust have been fully effected, and the said John Vaughan, by indenture bearing date the thirty-first day of August, in the year of our Lord one thousand seven hundred and ninety-eight, did grant, convey, and assign unto the said Thomas
123 Fitzsimmons, John Miller, junior, and *and* Robert Bird all of his, said John Vaughan's, estate, real and personal and mixed, whatsoever and wheresover, to hold to the said Thomas Fitzsimmons, John Miller, junior, and Robert Bird, and the survivors of them, their and his heirs, executors, administrators, and assigns, upon trust to sell and dispose of the same for the benefit of certain creditors of the said John Vaughan and therein mentioned, as in and by the said recited indenture (recorded at Philadelphia in Deed-book E. F., No. 7, page 24), relation being thereunto had — more fully may appear;

And whereas, upon a division of such of the above-mentioned tracts of land as were not disposed to answer the purposes of the trust under which the said Joseph Priestly held the part and the share of the said John Vaughan as aforesaid, made between the said Joseph Priestley and the said Thomas Fitzsimmons, John Miller, junior, and Robert Bird, trustees aforesaid, with the full concurrence of the said John Vaughan, the several tracts of land hereafter described and intended to be hereby granted were allotted to the
124 said Thomas Fitzsimmons, John Miller, junior, and Robert Bird, as trustees aforesaid, as the full part or share to which they were entitled under the above-recited indenture to them from the said John Vaughan of all the above-mentioned tracts of land remaining undisposed of; and forasmuch as divers inaccuracies have been discovered in the original surveys made of several of the tracts which in the division aforesaid fell to the lot and share of them, the said Thomas Fitzsimmons, John Miller, junior, and Robert Bird, trustees aforesaid, the same have, therefore, been since resurveyed, and are now more accurately designated in the annexed draft thereof representing each tract as it is actually surveyed and marked on the ground: Now, this indenture witnesseth: That the said Joseph Priestley, in full and final execution and compliance with the trust imposed in him, and for and in consideration of one dollar, lawful money of the United States, unto the said Joseph Priestley by the

said Thomas Fitzsimmons, John Miller, junior, and Robert Bird, at the execution hereof well and truly paid, the receipt whereof is hereby acknowledged, they, the said Joseph Priestley and
125 Elizabeth, his wife, have granted, bargained, and sold, and by these, by and with the consent and approbation of the said John Vaughan, testified by his becoming a party to and executing these presents, do grant, bargain, and sell unto the said Thomas Fitzsimmons, John Miller, junior, and Robert Bird, and to their heirs and assigns (except as hereinafter excepted as to certain parts of tracts already sold and conveyed) all the following tracts of land, numbered respectively as hereunder mentioned, agreeing with the plot or draft thereof hereunto annexed, that is to say:

No.	Warrantee.	No. acres.	Name of tract.	When patented.
Four	Joseph Temple	400	Smyrna	24 Feb'y, 1795
Forty-six	Henry Bryson	400	Amsterdam	9 M'ch, 1795
Forty two	James Spalding	400	Greenwich	12 M'ch, 1795
Nineteen	Henry Seeley	400	Fertility	3 M'ch, 1795
Thirty-one	John Parker	400	St. Johns'	24 Feb'y, 1795
Twenty	George Moore	375	Greenfield	24 Feb'y, 1795
Twenty-nine	Jesse Parker	400	Birmingham	3 M'ch, 1795
Thirty-two	John Hanison	400	Carmagnole	6 M'ch, 1795
Forty-five	Joseph Seeley	400	Amherst	3 M'ch, 1795
Fifteen	Samuel Cooley	375	Felicity	9 M'ch, 1795
Fifty-one	Henry Betz	347 a 27 p's	Litchfield	13 M'eb, 1795
Fifty	Joseph Betz	343 a & 27 p's	Longford	12 M'ch, 1795
125½ Forty three	Hugh Spalding	354 157 p's	Fruitful	11 M'ch, 1795
Thirty three	Roger Coursey	400	Richmond	24 Feb'y, 1795
Thirty-six	Samuel Turner	436 42 p's	Industry	11 M'ch, 1795
Forty-nine	John Betz	343 27 p's	Frugality	12 M'ch, 1795
Forty-seven	Samuel Fritz	343 27 p's	Mount Hope	13 M'ch, 1795
Forty-eight	James Betz	343 27 p's	Greenfield	12 M'ch, 1795
One hundred — twenty-two	Wm. Bender	430 32 p's	Williamsburg	24 Feb'y, 1795
One hundred — nineteen	Chas. Warren	511¼	Charleston	24 Feb'y, 1795
One hundred — eighteen	James Warren	511¼	Cicero	5 M'ch, 1795
One hundred — twenty-one	Samuel Warren	428¾	Fruitful Valley	10 M'ch, 1795
One hundred — twenty-three	Joseph Binder	430 32 p's	Clearfield.	

Mesne conveyance.—Patented to Samuel Wallace, Esquire, and by Samuel Wallace and wife conveyed to John Vaughan by indenture of date 7 April, 1795, who, by endorsement thereon of date Feb'y 2, 1798, conveyed the same to the present grantor, Joseph Priestley.

No.	Warrantee.	No. acres.	Name of tract.	When patented.
Seventy-five	Jonathan Hampton	400	Dryden	6 M'ch, 1795
Ninety-seven	Jonathan North	400	Mount Hope	5 Feb'y, 1795
Sixty	Peter Edge	343 27 p's	Brutus	23 Feb'y, 1775
One hundred	George Schotts	400	Springfield	24 Feb'y, 1795
Eighty two	Mary Wallis	451 150 p's	Plainfield	13 M'ch, 1795
Ninety-one	Joseph Siddons	400	Ensfield	23 Jan'y, 1795
Sixty three	Paul Moore	400	Dumpies	3 M'ch, 1795
Seventy three	Andrew Siddons	400	Stanhope	26 Jan'y, 1795
One hundred and seven	Jno. Barron, junior	400	Germany	11 M'ch, 1795
Eighty-seven	Simon Hardy	400	Davy	26 Jan'y, 1795
One hundred and eight	Joseph Anderson	400	Ryford	9 M'ch, 1795
One hundred and four	George Barnes	400	Pottsgrove	13 M'ch, 1795
Eighty-five	Elizabeth Rush	425	Oatfield	16 M'ch, 1795

No.	Warrantee.	No. acres.	Name of tract.	When patented.
Seventy-two	George Siddons	400	Sidney	26 Jan'y, 1795
Eighty-one	Mercy Ellis	400	Richland	16 M'ch, 1795
Eighty-six	Mary Robb	425	Rockland	16 M'ch, 1795
One hundred and seventeen	Peter Temple	400	Simplicity	24 Feb'y, 1795
126 Eighty-four	Ann Harris	448-19	Olympus	16 M'ch, 1795
One hundred and nine	Sam'l Anderson	400	Bristol	9 M'ch, 1795
One hundred and seven	Peter North	400	Eden	3 M'ch, 1795
Ninety-three	Peter Haga	400	Fairview	26 Jan., 1795
Ninety-nine	Fred'k Schotts	400	Fred'ricksburg	24 Feb'y, 1795
Eighty three	Moses Rush	427-16	Lisle	16 M'ch, 1795
Sixty-seven	Sam'l Edge	400	Union	23 Feb'y, 1795
Eighty-eight	James Hardy	400	Denmarck	26 Feb'y, 1795
Eighty nine	Nathan Hardy	400	Belmont	26 Jan., 1795
Seventy-eight	Herman Castator	400	Belfast	10 M'ch, 1785
Sixty-two	George Temple	400	Maple Grove	24 Feb'y, 1795
One hundred and fourteen	Andrew Ladley	400	Hampton	26 Jan'y, 1795
One hundred and fifteen	Peter Ladley	400	Pleasant Vale	2 Jan'y, 1795

Mesne Conveyance.—Patented to Samuel Wallis, and by him and his wife, Lydia, conveyed to John Vaughan by indenture of date 7th of April, 1795, who, by endorsement thereon of date 2d of Feb'y, 1798, conveyed the same to the present grantor, Joseph Priestley.

All which tracts are distinguished and marked in the annexed plan by numbers corresponding with those above enumerated, and are situated and bounded as the same are represented and described by the said annexed plan of the survey as actually resurveyed and marked on the ground as aforesaid; likewise the tracts following, viz., a certain tract called "Sydenham," containing four hundred and nine acres and one-fourth of an acre, of which William Plunket is the warrantee, patented the 24th March, 1794; a certain other tract called "Stall Grove," containing four hundred and four-
127 fourteen acres, of which the warrantee is John Stall, patented the 13 March, 1795, and a certain other tract called "Little Julia," containing four hundred and nine acres and one-fourth of an acre, of which the warrantee is Mordica Owen, patented the 12 March, 1795, all which three last-mentioned tracts were patented to Doctor Benjamin Rush, and are situated in Lycoming county, in the State of Pennsylvania, which said Dr. Benjamin Rush, with Julia, his wife, by indorsements on the patents, conveyed the same to the present grantor, Joseph Priestly, together with all and singular the rights and privileges thereunto belonging, and the reversions and remainders, rents, issues, and profits thereof, and all the estate, right, title, interest, claim, and demand whatsoever of him, the said Joseph Priestly and Elizabeth, his wife, in law or in equity of, in, and to or out of the same, excepting, however, out of the present conveyance the following parts of tracts of land already sold and conveyed as follows, to wit: A part of tract No. thirty-three taken up in the name of Roger Coursey, as described in the annexed draft, bounded as follows: Beginning at a birch
128 at the southeast corner of said tract; thence north sixty and one-half degrees west sixty perches to a heap of stones; thence north forty-one degrees east forty-eight perches to a stone heap; thence north sixty-eight degrees east seventy-eight perches to a heap of stones by a white walnut; thence south twenty-nine degrees west one hundred and eight perches to the place of begin-

ning, containing twenty-four acres and a half, was granted, bargained, and sold unto Samuel Rogers August the second, A. D. MDCCCII; also a part of the tract of land No. four taken up in the name of Joseph Temple, and described in the next draft as follows, to wit: Beginning at a sugar at the southwest corner of the said tract marked No. four *five;* thence north twenty-nine degrees east two hundred and forty-four perches to a hemlock; thence south sixty-one degrees east eighty-four perches to a post; thence south twenty-nine degrees west one hundred and six perches to a post; thence south sixty-one degrees east fifty-three perches to a stone heap; thence south twenty-nine degrees west one hundred and ten perches to a beech; thence north sixty-one degrees west one hundred and thirty-seven perches to the place of beginning,
129 containing one hundred and forty-one acres and twenty-two perches, which part of the tract was granted, bargained, and sold to Peter Donium and Johnathan Hartley; also, a part of the tract of land No. one hundred and eighteen taken up in the name of James Warren as described in the annexed draft: Beginning at a beech at the northwesternmost corner of the said tract; thence south sixty-one degrees, east three hundred and twenty-four perches to a white walnut; thence south twenty-nine degrees west one hundred and sixty-two perches to a post; thence north sixty-one degrees, west three hundred and twenty-four perches to a stone; thence north twenty-nine degrees, east one hundred and sixty-two perches to the place of beginning, which was granted, bargained, and sold unto John Warren and Powel Bird; to have and to hold the above-described tract of land (excepting as above mentioned), hereditaments and premises, hereby granted, with the appurtenances, unto the said Thomas Fitzsimmons, John Miller, junior, and Robert Bird, their heirs and assigns, to their only proper use and behoof, forever,
130 in trust, nevertheless, to and for the same uses, intents, and purposes as are mentioned and expressed in the above-recited indenture from the said John Vaughan to the said Thomas Fitzsimmons, John Miller, junior, and Robert Bird, and to and for no *no* other use, interest, or purpose whatsoever, so that neither in the said Joseph Priestley, nor his heirs, nor any person or persons lawfully claiming or to claim by, from, or under him, them, or any of them, shall at any time hereafter have, claim, challenge, or demand any estate, right, title, or interest of, in, to, or out of the hereby-granted premises, or any part thereof, but of and from all such rights, claims, and demands shall be debarred and forever excluded by virtue of these presents.

In testimony whereof the said parties have hereunto set their hands and seals the day and year first above written.

JOSEPH PRIESTLEY. [SEAL.]
ELVIRA PRIESTLEY. [SEAL.]
JOHN VAUGHAN. [SEAL.]
THOMAS FITZSIMMONS.
JOHN MILLER, JUNIOR, AND
ROBERT BIRD,
By their attorney-in-fact, JOHN VAUGHAN.

131 On this fifth day of March, anno Domini one thousand eight hundred and six, before me, Thomas Cooper, president judge of the eighth district of Pennsylvania, personally appeared Joseph Priestley and Elizabeth, his wife, the above-named grantors in the predeeding indenture, and in due form of law acknowledged the same to be their act and deed, and desired the same might be recorded as such. She, the said Elizabeth, being of full age, and by me apart from her said husband thereon examined, did declare and say that she became a party thereto voluntarily, without any compunction, fear, or undue influence whatsoever.

Witness my hand and seal the day and year aforesaid.

THOMAS COOPER. [SEAL.]

Received on the day of this date of the above-named Thomas Fitzsimmons, John Miller, junior, and Robert Bird the sum of one dollar, lawful money of the United States, being the full consideration money above mentioned.

Witness my hand October the twenty-fifth, anno Domini one thousand eight hundred and five.

JOSEPH PRIESTLEY.

Witness present at signing:

—— ——.

132 Sealed and delivered in the presence of us (the words "tracts of land" between the sixteenth and seventeenth lines from the bottom being first above extinguished, and the name of George Warner in the schedule being scored through and the tract in the name of Joseph Binder added in lieu thereof).

ROBERT SMITH.
JAMES ROBERTSON.
THOS. COOPER.

BRADFORD COUNTY, *ss:*

Recorded Sept 9, 1840, in the office for recording of deeds in and for said county, in Deed-book, vol. 17, page 287, &c. Witness my hand and official seal the date aforesaid.

[SEAL.] E. W. BAIRD, *Recorder.*

Exhibit K.

133 Endorsed: Deed. Joseph Priestley and wife to Thomas Fitzsimmons, John Miller, junior, and Robert Bird. Filed Sept. 9, 1840.

Tax	50
Fees	3 46
	$3 96

Paid.

(Here follow diagrams, marked pp. 134, 135, 136, 137, & 138, which are omitted.)

139 EXHIBIT Q.

STATE OF PENNSYLVANIA, } ss:
County of Bradford, }

Among the records of Bradford county *inter alia* appears the following, viz:

This indenture, made the second day of November, in the year of our Lord one thousand eight hundred and sixty-nine, between Elisha A. Packer, of the city and State of New York, of the first part, and Jacob Dewitt, of Towanda boro', Bradford county, State of Pennsylvania, of the other part—

Witnesseth: That the said Elisha A. Packer, for and in consideration of the sum of twenty thousand dollars (20,000), lawful money of the United States of America, unto him well and truly paid by the said Jacob Dewitt at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold, aliened, enfeoffed, released, and confirmed, and by these presents does grant, bargain, sell, alien, enfeoff,
140 release, and confirm, unto the said Jacob Dewitt, his heirs and assigns, all that certain tract and parcel of land situate, lying, and being mostly, if not all, in the township of Overton, in the said county of Bradford and State of Pennsylvania, and bounded and described as follows:

Beginning at a hemlock, being a corner tract surveyed in the warrantee name of George Moore, being one of the tracts hereby conveyed — Henry Betz and Peter Edge; thence north sixty-one degrees west two hundred perches to a post, being the northwest corner of said George Moore tract; thence south twenty-nine degrees west nine hundred and fifty-four perches along the west line of said George Moore tract, and also of Samuel Cooley and James Hardy; thence south sixty-one degrees east two hundred perches to a post in west line of tract surveyed in the warrantee name of Samuel Fritz; thence south twenty-nine degrees west along said last-mentioned line one hundred and eight perches, more or less, to a sugar tree, being the southwest — of said Samuel Fritz and the north-
141 west corner of John Fritz; thence south sixty-one degrees east five hundred and ninety-five perches along the south line of said Samuel Hardy to a beach, being the southeast corner of said Samuel Hardy; thence north twenty-nine degrees east eight hundred and forty-eight perches to a sugar tree, being a corner of Henry Boysen, Samuel Temple, Robert Roberts, and James White; thence north sixty-one degrees west five hundred and ninety-five perches to a small beach, being the northwest corner of Joseph Betz, and in the east line of George Moore; thence north twenty-nine degrees east two hundred and twelve perches to the place of beginning, containing four thousand four hundred and eighteen acres, be the same more or less, and composed of eleven several tracts of land surveyed in the warrantee names following: George Moore, Samuel Cooley, James Hardy, Samuel Fitz, James Betz, John Betz, Joseph Betz, Samuel Hardy, Henry Seeley, Joseph Seeley, and Henry Bryson.

The courses and distances in this deed are those of the original surveys.

142 Together with all and singular the ways, waters, watercourses, rights, liberties, privileges, hereditaments, and appurtenances whatsoever thereunto belonging or in anywise appertaining, and the reversions and remainders, rents, issues, and profits thereof, and all the estate, right, title, interest, property, claim, and demand whatsoever of him, the said E. A. Packer, in law or equity or otherwise howsoever, of, in, and to the same and every part thereof; to have and to hold the said several tracts of land, the hereditaments and premises hereby granted or mentioned, and intended to be, with the appurtenances, unto the said Jacob Dewitt, his heirs and assigns, to and for the only proper use and behoof of the said Jacob Dewitt, his heirs and assigns, forever. And the said E. A. Packer, for himself, his heirs, executors, and administrators, does by these presents covenant, grant, and agree to and with the said Jacob Dewitt, his heirs and assigns, that he, the said E. A. Packer, and his heirs, all and singular the hereditaments and premises hereinabove described and granted or mentioned, and intended so to be,

143 with the appurtenances, unto the said Jacob Dewitt, his heirs and assigns, against him, the said E. A. Packer, his heirs and assigns, and against all and every other person or persons whatsoever lawfully claiming or to claim the same, or any part thereof, by, from, or under him or them, shall and will warrant and forever defend.

In witness whereof the said parties to these presents have hereunto interchangeably set their hands and seals.

Dated the day and year first above written.

E. A. PACKER. [SEAL.]

Sealed and delivered in the presence of us.

WILLIAM H. CLARKSON.
CHARLES NETTLETON.

STATE OF NEW YORK, }
City and County of New York, } *ss:*

On the first day of November, anno Domini 1869, before me, the subscriber, a commissioner *a commissioner* of the State of Pennsylvania for taking the acknowledgement and proof of deeds,

144 &c., personally appeared the within-named Elisha A. Packer, and in due form of law acknowledged the within or foregoing indenture to be his act and deed, and desired the same might be recorded as such.

Witness my hand and official seal the day and year aforesaid.

[OFFICIAL SEAL.] CHARLES NETTLESON,
Commissioner of Pennsylvania in New York.

Recorded August 30th, 1872.

STATE OF PENNSYLVANIA, } ss:
County of Bradford, }

I, A. D. Munn, recorder of deeds in and for said county of Bradford and State of Pennsylvania, do hereby certify that the foregoing written instrument is a true and correct copy of the original deed, so full and entire as remains of record in this office, and that the same was duly recorded in this office on the 30th day of August, 1872, in Deed-book No. 112, at page 288, &c.

Witness my hand and seal this 5th day of March, A. D. 1885.

A. D. MUNN, *Recorder.*

145 STATE OF PENNSYLVANIA, } ss:
County of Bradford, }

I, Paul D. Morrow, presiding judge of the court of common pleas of the county of Bradford, in which the hereinbefore-mentioned office of recorder of deeds in — for the county of Bradford is situate and kept, do hereby certify that the foregoing attestation is in due form and by the proper officer.

In testimony whereof I have hereunto set my hand this 5th day day of May, A. D. 1885.

PAUL D. MORROW,
President Judge.

STATE OF PENNSYLVANIA, } ss:
County of Bradford, }

I, William J. Young, prothonotary of the court of common pleas of Bradford county, do certify that the Honorable Paul D. Morrow, the presiding judge of said court and by whom the foregoing certificate was made, is duly qualified and commissioned as such presiding judge, and was so when such certificate was made.

146 In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Towanda, this eighth day of May, A. D. 1885.

[Seal of Bradford County.]

W. J. YOUNG,
Prothonotary.

Exhibit Q.

147 EXHIBIT R.

This article of agreement witnesseth: That E. A. Packer, — the city of New York, has this day entrusted to Jacob Dewitt, of Towanda, Bradford county, Pennsylvania, a certain deed of said Packer to said Jacob Dewitt, dated November 2nd, 1869, and purporting to convey eleven certain tracts of land situate in Bradford county, Pennsylvania, and surveyed in the warrantee names following: George Moore, Samuel Cooley, James Hardy, Samuel Fritz, James Betz, John Betz, Joseph Betz, Samuel Hardy, Henry Seeley, Joseph Seeley, and Henry Bryson, particularly described in said deed for the purpose following, and none other; that — the said J. Dewitt pay to the said E. A. Packer, within twenty days from the date hereof, the full and just sum of sixteen thousand dollars, then

The courses and distances in this deed are those of the original surveys.

142 Together with all and singular the ways, waters, watercourses, rights, liberties, privileges, hereditaments, and appurtenances whatsoever thereunto belonging or in anywise appertaining, and the reversions and remainders, rents, issues, and profits thereof, and all the estate, right, title, interest, property, claim, and demand whatsoever of him, the said E. A. Packer, in law or equity or otherwise howsoever, of, in, and to the same and every part thereof; to have and to hold the said several tracts of land, the hereditaments and premises hereby granted or mentioned, and intended to be, with the appurtenances, unto the said Jacob Dewitt, his heirs and assigns, to and for the only proper use and behoof of the said Jacob Dewitt, his heirs and assigns, forever. And the said E. A. Packer, for himself, his heirs, executors, and administrators, does by these presents covenant, grant, and agree to and with the said Jacob Dewitt, his heirs and assigns, that he, the said E. A. Packer, and his heirs, all and singular the hereditaments and premises hereinabove described and granted or mentioned, and intended so to be,

143 with the appurtenances, unto the said Jacob Dewitt, his heirs and assigns, against him, the said E. A. Packer, his heirs and assigns, and against all and every other person or persons whatsoever lawfully claiming or to claim the same, or any part thereof, by, from, or under him or them, shall and will warrant and forever defend.

In witness whereof the said parties to these presents have hereunto interchangeably set their hands and seals.

Dated the day and year first above written.

E. A. PACKER. [SEAL.]

Sealed and delivered in the presence of us.

WILLIAM H. CLARKSON.
CHARLES NETTLETON.

STATE OF NEW YORK, }
City and County of New York, } *ss:*

On the first day of November, anno Domini 1869, before me, the subscriber, a commissioner *a commissioner* of the State of Pennsylvania for taking the acknowledgement and proof of deeds,

144 &c., personally appeared the within-named Elisha A. Packer, and in due form of law acknowledged the within or foregoing indenture to be his act and deed, and desired the same might be recorded as such.

Witness my hand and official seal the day and year aforesaid.

[OFFICIAL SEAL.] CHARLES NETTLESON,
Commissioner of Pennsylvania in New York.

Recorded August 30th, 1872.

STATE OF PENNSYLVANIA, } ss:
County of Bradford, }

I, A. D. Munn, recorder of deeds in and for said county of Bradford and State of Pennsylvania, do hereby certify that the foregoing written instrument is a true and correct copy of the original deed, so full and entire as remains of record in this office, and that the same was duly recorded in this office on the 30th day of August, 1872, in Deed-book No. 112, at page 288, &c.

Witness my hand and seal this 5th day of March, A. D. 1885.

A. D. MUNN, *Recorder.*

145 STATE OF PENNSYLVANIA, } ss:
County of Bradford, }

I, Paul D. Morrow, presiding judge of the court of common pleas of the county of Bradford, in which the hereinbefore-mentioned office of recorder of deeds in — for the county of Bradford is situate and kept, do hereby certify that the foregoing attestation is in due form and by the proper officer.

In testimony whereof I have hereunto set my hand this 5th day day of May, A. D. 1885.

PAUL D. MORROW,
President Judge.

STATE OF PENNSYLVANIA, } ss:
County of Bradford, }

I, William J. Young, prothonotary of the court of common pleas of Bradford county, do certify that the Honorable Paul D. Morrow, the presiding judge of said court and by whom the foregoing certificate was made, is duly qualified and commissioned as such presiding judge, and was so when such certificate was made.

146 In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Towanda, this eighth day of May, A. D. 1885.

[Seal of Bradford County.]

W. J. YOUNG,
Prothonotary.

Exhibit Q.

147 EXHIBIT R.

This article of agreement witnesseth: That E. A. Packer, — the city of New York, has this day entrusted to Jacob Dewitt, of Towanda, Bradford county, Pennsylvania, a certain deed of said Packer to said Jacob Dewitt, dated November 2nd, 1869, and purporting to convey eleven certain tracts of land situate in Bradford county, Pennsylvania, and surveyed in the warrantee names following: George Moore, Samuel Cooley, James Hardy, Samuel Fritz, James Betz, John Betz, Joseph Betz, Samuel Hardy, Henry Seeley, Joseph Seeley, and Henry Bryson, particularly described in said deed for the purpose following, and none other; that — the said J. Dewitt pay to the said E. A. Packer, within twenty days from the date hereof, the full and just sum of sixteen thousand dollars, then

the said deed to be of full force and virtue; otherwise the said deed to be returned to said E. A. Packer, it being the true interest and meaning of this agreement, and the arrangement referred to, that the said deed vests no title whatever in said grantee until the purposes and conditions upon which it is entrusted to him, as
148 herein set forth, shall be fully performed.

Witness my hand and seal this second day of November, A. D. 1869.

(Sig.) JACOB DEWITT.

I hereby certify that the above is a true copy of the original.

JOS. J. CARTER.

Exhibit R.

149 & 150 *Writ of Error to the Circuit Court of the United States, Western District of Pennsylvania.*

In the Supreme Court of the United States.

SCHRAEDER MINING AND MANUFACTURING COMPANY, Plaintiff in Error, Defendant Below,

vs.

ELISHA A. PACKER, Defendant in Error, Plaintiff Below.

Assignments of error.

And now comes the Schraeder Mining and Manufacturing Company, plaintiff in error, defendant below, and here respectfully assigns the following errors manifest upon the record of this cause (*prout* the said record), to wit:

I. The learned court erred in refusing to remand this cause to the State court from whence it originated.

II. The learned court erred in refusing to allow defendant
151 below to plead the statute of limitations.

III. The learned court erred in excluding the following offer of evidence made by the defendant below on the trial of the cause. The offer was as follows:

In connection with this evidence the defendant offered to give further evidence, founded on examinations made upon the ground by surveyors in connection with the maps and other documents already in evidence, to show that the Moore warrant was not actually surveyed on the ground according to its return of survey, but that it was surveyed, together with the Cooley and other warrants to the south of it, in one block, of which the Moore was the northern member; that the north line of said block, as actually surveyed upon the ground in 1792, was run between the hemlock sapling and sugar corners corresponding to what was claimed by the defendant to be the south line of the Andrew Tybout tract; that no line of
1792 was surveyed on the ground for the Moore warrant north from the hemlock sapling corner, nor west from the hemlock north-
152 east corner of the Tybout tract; that the line south from the hemlock northeast corner aforesaid was run for warrants to

the east of said line, and was adopted merely by the return of the Moore.

To this evidence the plaintiff objected on the ground that twenty-one years and upwards having elapsed from the date of the Moore survey there was a presumption, *juris et de jure*, that the said survey was made as returned, and the evidence was therefore inadmissable.

The court sustained this objection and excluded the evidence so offered, and thereupon the defendant did then and there except to the said ruling and to the exclusion of said evidence, and at its request this bill of exceptions was then and there noted and is now signed.

The evidence in connection with which the foregoing offer was made is stated in the bill of exceptions as follows:

The defendant alleged that the plaintiff's tract was never actually surveyed upon the ground north from the hemlock sapling to the sugar corner corresponding to the south line of the Tybout
153 survey, and in support of its allegation relied upon the following evidence, which appeared in the cause:

As a part of his chain of title the plaintiff put in evidence a deed tripartite dated October 25, 1805, between Joseph Priestley and wife, of the first part; John Vaughan, of the second part, and Thomas Fitzsimmons, John Miller, junior, and Robert Bird, trustees for certain creditors of John Vaughan, of the third part, which recited that "Forasmuch as divers inaccuracies have been discovered in the original surveys made of several of the tracts which in the division aforesaid fell to the lot of them, the said Thomas Fitzsimmons, John Miller, junior, and Robert Bird, trustees aforesaid, the same have therefore been since resurveyed and are now more accurately designated in the annexed draft thereof representing each tract as it is actually surveyed and marked upon the ground (mentioning subsequently, *inter alia*, the George Moore warrant, and giving also its fancy name of Greenfield), all which tracts are distinguished and marked on the annexed plan by numbers corresponding with those above enumerated, and are represented and described by the
154 said annexed plan of the resurvey thereof as actually resurveyed and marked on the ground as aforesaid," and to which was attached a certain map referred to therein, which map was also given in evidence by the plaintiff. A full copy of the said tripartite deed is hereto annexed and marked Exhibit K.

The width of the George Moore warrant, as shown by this map, was 200 rods, which corresponds with the distance laid down in the return of survey, but the call in the return for General Broadhead's lands gives the Moore survey an additional width of about thirty rods. The said map showed the George Moore lot in the same position as in the survey thereof with regard to the surrounding lots of Henry Betz, Joseph Betz, and Samuel Cooley.

It was also shown by the plaintiff's surveyors, or one of them, that beginning on the north line of the Moore survey, as located on the ground by its return, at a point two hundred rods westerly from

the hemlock, northeast corner, a line extended from a corner marked in 1798 nearly parallel with the east line of the Moore tract, and also nearly parallel with such east line, projected southerly, which
155 was run in 1798 for about three miles and sixty-four rods, where it ended, and an offset was thence made to the west to an undisputed line of 1792, bounding the Broadhead or Barclay lands on the east, the plaintiff's surveyor testifying that the said line of 1798 was evidently a trial line. Said Broadhead line ran about thirty rods distant from and nearly parallel with said line of 1798 and extended from the hemlock sapling corner before mentioned a distance of five or six miles southerly.

Plaintiff's evidence also showed a general survey of 1798 to have been marked on a number of the tracts mentioned in said deed of 1805. The map attached to said deed in laying down the George Moore survey thereon, and other surveys south of the same, laid them down as 200 perches in width, being the width called for in the official surveys, and being about thirty perches less in width than the actual distance to the old line of the Broadhead lands called for in said survey, and it was claimed by the defendant that the map thus showed the George Moore warrant was bounded on said map by the line of 1798 aforesaid.

156 No other general survey of the lands mentioned in said deed of 1805 was made between the dates of the warrants and the date of the deed of 1805.

It was shown by one of plaintiff's surveyors that in 1860 he made a survey of the Barclay lands for their owners, he having then in his possession the field notes of his grandfather, one Major Zephon Flowers, whose work has been found dating as early as 1795, and who surveyed and mapped the Barclay lands for their owners in 1828.

That on said survey of 1860 the said surveyor, one Z. F. Walker, found the corner of 1798 at the north end of the line of 1798, and also followed the said line of 1798 either then or in 1866 to its end; that in 1860 he searched northerly from the hemlock sapling corner for a line of 1792, but found none.

That he surveyed the said lands in 1866 for their owners, and afterwards in 1880 for the plaintiff, but on neither survey did he find any marks of 1792 north from the hemlock sapling corner (no timber being left north of Schraeder creek on this line after
157 1867 or 1868) nor west from the hemlock northeast corner corresponding to the return of survey of the Moore.

It also appeared by plaintiff's surveyors that no original marks were ever found on the line corresponding with the south line of the Moore, as returned, nor were original corners ever found at either end of said south line.

Defendants put in evidence certain official connected maps or drafts from the land office of Pennsylvania, one bearing date 1799, called the Broadhead map, a photographic copy of which is attached hereto and made a part hereof and marked Exhibit L.

Also a certified connected map from the department of internal affairs of Pennsylvania of the George Moore and other warrants, a

copy of which is hereto attached and made a part hereof and marked Exhibit M.

Also a certified connected map from the said department of the Henry Epple, Catharine Eck, junior, and other warrants, a copy of which is hereto annexed and made a part hereof and marked Exhibit N.

158 Also a diagram prepared by defendant's counsel and proven to be accurate, showing the connection and relation of the three last-mentioned maps, a copy of which is hereto annexed and made a part hereof and marked Exhibit O.

Defendant, by its surveyors, also gave evidence tending to show that a line bearing marks dating 1792 was found from the sugar tree, the southeast corner of the Tybout tract, to the hemlock sapling corner mentioned, and that the sugar tree was marked as a corner of 1792, and that a corner of 1792 was found at the helmlock sapling corner.

The plaintiff's evidence showed the George Moore was bounded on the west from the hemlock sapling corner; south by a tract in the warrantee name of Robert Irwin, surveyed November 22, 1792, which was a part of the Broadhead lands.

Also that the hemlock northeast corner of the Moore was the northwest corner of a tract surveyed in the warrant name of Henry Betz on the 4th day of July, 1793, which tract adjoined the Moore on the east for about two-thirds the length of its east line, and that the said Moore was adjoined for the remainder of the distance on

159 its east *east* line by a tract surveyed in the warrant name of Joseph Betz on the 4th day of July, 1793.

The returns of survey of these two Betz tracts were made April 16, 1794, with the Moore, Cooley, and Irwin.

Also that the tier of warrants east of the Betz tier of warrants was surveyed on the 19th and 20th of November, 1792, as will appear by a plot of connected surveys made by plaintiff's surveyors and given in evidence, a copy of which is hereto annexed and marked Exhibit P.

It was testified by one of plaintiff's witnesses, one of the surveyors, that he had found no original line dividing the Moore and Cooley, the Cooley and Hardy, and the Hardy and Seeley, which was as far south as he had examined in this tier of warrants.

That southerly from the southeast corner of the Henry Betz and the southwest corner of the Samuel Temple he had found an old line run in 1798, but no original line bearing the date of survey of the tracts abutting upon it as far south as he had examined,

160 some three miles; nor had he found any original corners for that distance southerly on that line.

That he had found no cross-lines running in an eastwardly and westwardly direction dividing the two tiers of warrants lying east of the Moore, Cooley, and Hardy, and that the said two tiers were located by lines of corners.

That, so far as he had searched, he had never found any cross-lines running eastwardly and westwardly of the block including the

Moore and Cooley and of the block including the Betz and Temple warrants.

But the common corners of the Cooley and Hardy lots and of the Hardy and Seeley lots in the old line of 1784 were identified by one or more of the witnesses, surveyors, and a line run and marked in 1792, forming the eastern boundary of the second tier of lots east of the George Moore, namely, Samuel Temple, Henry Bryson, Joseph Seeley, Henry Seeley, and Samuel Hardy (as shown in Exhibit P), was followed, and identified by a surveyor employed by both parties in 1875, and who was a witness and testified thereto, and who
161 found the corners of all of said last-mentioned lots in said line.

There was evidence tending to show that no difference could be detected in the count of a line marked November 21, 1792, and one marked July 4, 1793.

The defendant gave in evidence certain field notes of Major Flowers of surveys made for the owners of the Barclay lands in 1828, showing examination made by him of the north line of the Andrew Tybout tract; also on the south line of said tract to the hemlock sapling corner, showing that he found the line of 1798 before mentioned running south from the north line of the Andrew Tybout tract, but containing no entry that he found at the time of his examination of said lines any marks of 1792 on the north line of the Moore or on the west line north from the hemlock sapling corner.

It appeared by the evidence of the plaintiff's surveyor, Walker, that he found the letters BAR for Barclay, with the numbers of the Barclay warrants, marked by Major Flowers, at the hemlock northeast corner of the Moore and Tybout warrants, at the sugar southeast corner, and at the hemlock sapling corner.

162 IV. The learned court erred in instructing the jury as follows:

"We think that an old survey like that of the Moore cannot be questioned at this late day by parties claiming under a junior title, whether that title took its origin within twenty or twenty-one years of the older survey or after that time.

The supreme court of this State so decided in this very case, and we think the decision was right, notwithstanding some earlier opinions which seemed to hold a different doctrine."

V. The learned court erred in refusing to affirm the first point of the defendants below, which was as follows:

"1. That if the jury believe the George Moore warrant, together with the Cooley and others to the south of it, were surveyed in one block, of which the Moore was the northern member; that the north line of said block, as actually surveyed upon the ground in 1792, was run between the hemlock sapling and sugar corners, corresponding to what is claimed by the defendant to be the south line
163 of the Andrew Tybout tract, the plaintiff has no title to the part of the land north of the said south line of the Tybout tract and cannot recover provided the jury believe the Tybout tract was actually surveyed and located upon the ground as claimed by the defendant."

VI. The learned court erred in refusing to affirm the second point of the defendant below, which was as follows:

"2. That if the jury believe that no line of 1792 was surveyed upon the ground for the Moore warrant north from the hemlock sapling corner and west from the hemlock claimed by the defendant to be the northeast corner of the Tybout tract, and that the line from the hemlock northeast corner aforesaid south to the sugar corner was run for warrants east of said line, and that said line was adopted by the return of survey of the Moore, such adoption will not avail to extend the Moore north of the line between the hemlock sapling and the sugar, provided the jury believe the last-mentioned line was the northern limit of the Moore block of
164 surveys and the Tybout was surveyed and located as claimed by the defendant."

VII. The learned court erred in refusing to affirm the third point of the defendant below, which was as follows:

"3. That, as the evidence shows, the Tybout tract was surveyed March 24, 1794, within two years of the date of survey of the Moore, and as the Tybout survey was duly returned, patent issued, and claim of title asserted thereunder up to the present time, and as twenty-one years did not elapse between the Moore and Tybout surveys, the presumption that the Moore was actually surveyed as returned is not conclusive, but may be rebutted by evidence."

VIII. The learned court erred in instructing the jury as follows:

"1. The contention of the defendant that its title to the land in dispute became established and valid as between itself and the plaintiff by the consent and acquiescence given by Jacob De-
165 witt, the plaintiff's agent, to the painted line made by Mr. Walker in 1866 cannot be admitted.

The assent given to that line by Jacob Dewitt was not given to it as a compromise line yielded to it for the purpose of ending a dispute or difference between the parties, for there was no such dispute or difference.

They had no knowledge that the George Moore survey, belonging to the plaintiff, interfered with the Andrew Tybout survey of the defendant's predecessors and grantors. The intimation thrown out by Mr. Walker in presence of Jacob Dewitt (if such was the fact) that there was some interference on the Tybout tract was not sufficient notice of the interference that actually existed, especially as Mr. Walker immediately added that he had put the line where he thought it ought to be and where it always had been.

No question of title had arisen between the parties, and this observation of Walker, if made at all, was not such as to awaken Dewitt's mind to the character of the conflict that actually existed between the titles."

166 IX. The learned court erred in instructing the jury as follows:

"2. It cannot be conceived for a moment that if the plaintiff or his agent had known of this interference (his being the superior title) he or the agent would ever have consented to the line that was run.

If, with full knowledge of his rights, he had consented to it, it would have presented a different question.

But there is no evidence that he or his agent, or those acting for the Schrader company, had any knowledge or notice of it whatever. It was a clear mutual mistake—one that ought not to conclude or bind the plaintiff to the loss of his land."

X. The learned court erred in instructing the jury as follows:

"3. It is a question of error and mistake. It is not a question of consentable or compromise line at all. In our opinion there is not sufficient evidence in the case to be submitted to the jury for them to deliberate on the question whether the painted line was a
167 compromise line knowingly adopted by the parties so as to bind them in reference to the now acknowledged interference of the surveys.

XI. The learned court erred in instructing the jury as follows:

"4. But, in our view, this case, in which a boundary line has been adopted by mistake, has nothing of license in it.

There was no intention to give a license. The transaction has not a single element of license. It was simply a mutual mistake in the location of the line which was supposed to separate the respective lands of the parties."

XII. The learned court erred in instructing the jury as follows:

"5. We charge you, therefore, that if the painted line was assented to by the plaintiff's agent in ignorance of the true boundaries of the plaintiff's land, and in ignorance of the interference between the Moore and Tybout surveys, then the defendants was not pro-
168 tected by that line from an action of trespass in taking and carrying away the timber from the plaintiff's land, and as there is no sufficient evidence to show that the plaintiff or his agent knew the true boundaries, and knew of the interference between the said surveys at the time of the cutting, you are to presume, under the circumstances of the case, that they were ignorant of the same."

XIII. The learned court erred in refusing to affirm the defendant's fourth point, which was as follows:

"4. That if the jury believe Jacob Dewitt had charge of the Packer lands and was authorized to protect them from depredation, and had knowledge of defendant's claim of title up to the painted line and of the painting of said line in assertion of such claim, and that said Jacob Dewitt did not object to the painting of said line, but acquiesced therein and assented thereto, the jury would be warranted in finding the actual possession of the disputed lands to have been in the defendant when the alleged trespasses were committed, provided they believe the evidence of the defendant as to the surveys
169 and other acts of ownership done upon the ground by the defendant, together with the payment of taxes; and if they do so find the actual possession to have been in the defendant the plaintiff cannot recover."

XIV. The learned court erred in refusing to affirm defendant's fifth point, which was as follows:

"5. That if the jury believe that Packer authorized Jacob Dewitt to establish the Tybout line as painted, or subsequently consented

to such establishment, and that the same was established in good faith, the plaintiff cannot recover."

XV. The learned court erred in refusing to affirm defendant's sixth point, which was as follows:

"6. That if the jury believe Jacob Dewitt had charge of the Packer lands and was authorized to protect them from depredation, and in pursuance of such charge and authority consented to the establishment of the painted line, and the defendant in good faith, relying on such consent, took the timber, the plaintiff cannot recover."

170 XVI. The learned court erred in refusing to affirm defendant's seventh point, which was as follows:

"That the conveyance from Packer to Dewitt took effect from November 2, 1869, for all the purposes of this case."

XVII. The learned court erred in refusing to affirm defendant's eighth point, which was as follows:

"8. That there can be no recovery in this case for timber removed from the disputed territory subsequent to November 2, 1869."

These points were declined by the court, and the court on the contrary charged the jury that the plaintiff, if entitled to recover damages at all, was entitled to recover damages for all cutting and carrying away of timber from the disputed premises up to the time that he actually sold the property to Jacob Dewitt, which, according to his testimony, was the first day of October, 1870.

WILLIAM T. DAVIES,
EDWARD OVERTON, JR.,
JOHN F. SANDERSON,
Attorneys for Plaintiff in Error.

171 *Prayer for Reversal.*

In the Supreme Court of the United States.

SHRAEDER MINING AND MANUFACTURING COMPANY, Plaintiff in Error, Defendant below,

vs.

ELISHA A. PACKER, Defendant in Error, Plaintiff below.

To the honorable the justices of the said court:

The plaintiff in error, the Schraeder Mining and Manufacturing Company, humbly complaining, showeth to this honorable court the record of this cause brought by writ of error from the circuit court of the United States for the western district of Pennsylvania, and the errors thereon assigned and manifest, thereby and thereupon prays the honorable court, on consideration thereof, to reverse the judgment appearing upon said record against your petitioner, and thereupon to make such order as to justice may belong.

172 And your petitioner will ever pray, &c.

WILLIAM T. DAVIES,
EDWARD OVERTON, JR.,
JOHN F. SANDERSON,
Attorneys for Plaintiff in Error.

173 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the western district of Pennsylvania, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between Elisha A. Packer, plaintiff, and The Schraeder Mining and Manufacturing Company, defendant, a manifest error hath happened, to the great damage of the said defendant, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the eleventh day of June, in the year of our Lord one thousand eight hundred and eighty-five.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
JOSEPH P. BRADLEY,
Asso. Justice of Sup. Court U. S.

[Endorsed:] No. 45. May T., 1884. Writ of error. Filed June 17, 1885.

174 WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

In the Circuit Court of the United States for the Western District of Pennsylvania. May Term, 1884.

ELISHA A. PACKER
vs.
THE SCHRADER MINING & MANUFACTURING COMPANY. } No. 45.

I, H. D. Gamble, clerk of the circuit court of the United States for

the said district, do hereby certify that the annexed and foregoing pages contain a true copy of the record and proceedings in the above-entitled case so full and entire as the same remains of record and on file in my office.

In testimony whereof I have hereunto signed my name and affixed the seal of the said court, at Pittsburgh, this 1st day of October, A. D. 1885.

[Seal of the U. S. Circuit Court, W. D. Penn.]

H. D. GAMBLE, *Clerk.*

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

I, M. W. Acheson, judge of the United States district court for said district, presiding in the U. S. circuit court, do hereby certify that H. D. Gamble above named was, at the time of making the above certificate, and is now, clerk of the said court, and that the said certificate made by him is in due form of law.

M. W. ACHESON,
Judge Presiding in the U. S. Circuit Court.

Pittsburgh, Oct. 1st, 1885.

175 The United States of America to Elisha A. Packer, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western district of Pennsylvania, wherein The Schraeder Mining and Manufacturing Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Joseph P. Bradley, associate justice of the Supreme Court of the United States, this eleventh day of June, in the year of our Lord one thousand eight hundred and eighty-five.

JOSEPH P. BRADLEY,
Asso. Justice of the Sup. Court U. S.

176 On this 15th day of June, in the year of our Lord one thousand eight hundred and eighty-five, personally appeared John F. Sanderson before me, the subscriber, a United States commissioner in and for the western district of Pennsylvania, and makes oath that he delivered a true copy of the within citation to Stanley W. Little, one of the attorneys of the plaintiff, and produced and made known to him the contents of the original citation and writ of error on the twelfth day of June, A. D. 1885; also that he delivered a true copy of the within citation to D. C. DeWitt, one of the attorneys of the plaintiff, and produced and made known to him the contents of the original citation and writ of error, this fifteenth day of June, A. D. 1885.

JOHN F. SANDERSON.

Sworn to and subscribed the fifteenth day of June, A. D. 1885.
[Seal John W. Mix, U. S. Commissioner, Towanda, Pa.]

JNO. W. MIX,
U. S. Commissioner in & for West'n Dist. Pa.

Due service of the within citation is hereby admitted.
June 12, 1885.

[Endorsed:] No. 45. May T., 1884. Citation.

Endorsed on cover: W. Pennsylvania C. C. U. S. No. 1084. The Schraeder Mining and Manufacturing Company, plaintiff in error, *vs.* Elisha A. Packer. Filed October 13, 1885.